TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1957~~ 1958

No. ~~589~~ 10

ALLIED STORES OF OHIO, INC., APPELLANT,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED OCTOBER 30, 1957
PROBABLE JURISDICTION NOTED JANUARY 6, 1958

Supreme Court of the United States

OCTOBER TERM, 1957

No. 589

ALLIED STORES OF OHIO, INC., APPELLANT,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JUNE 20, 1958

[fol. 3]

IN SUPREME COURT OF OHIO

No. 34926

ALLIED STORES OF OHIO, INC., Appellant,

v.

STANLEY J. BOWERS, TAX COMMISSIONER, Appellee.

APPEAL FROM THE COURT OF APPEALS OF CUYAHOGA COUNTY

EXCERPTS FROM MEMORANDA OF PLEADINGS, ETC., FILED, WRITS ISSUED, ETC., JUDGMENTS, ORDERS AND DECREES

Journal No. 42, page 243.

Appeal From the Court of Appeals of Cuyahoga County:

JOURNAL ENTRY OF JUDGMENT—January 30, 1957

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant his costs herein expended taxed at $.....

Ordered, That a special mandate be sent to the Court of Appeals of Cuyahoga County, to carry this Judgment into Execution.

Journal No. 42, page 259.

Rehearing Docket:

JOURNAL ENTRY OF ORDER DENYING REHEARING—February 20, 1957

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

[fol. 4] [File endorsement omitted]

[fol. 5]

IN THE SUPREME COURT OF THE STATE OF OHIO

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed April 30, 1957

I. Notice is herewith given that Allied Stores of Ohio, Inc., the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Ohio affirming the Court of Appeals of Ohio for Cuyahoga County, such final judgment having been entered on January 30, 1957, and from the final judgment of the said Supreme Court of Ohio denying the appellant's application for rehearing entered on February 20, 1957.

This appeal is taken pursuant to 28 U.S.C.A., Section 1257 (2).

II. The clerk will please prepare a transcript of the record in the cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1) A copy of the final determination of the Tax Commissioner.

2) A copy of appellant's notice of appeal from the Tax Commissioner's final determination, as filed with the Board of Tax Appeals.

3) A copy of the opinion of the Board of Tax Appeals of Ohio.

4) A copy of the notice of appeal from the Board of Tax Appeals, to the Court of Appeals of Ohio for Cuyahoga County, as filed with that Court on behalf of the appellant.

5) A copy of the opinion and journal entry of the Court of Appeals of Ohio for Cuyahoga County.

[fol. 6] 6) A copy of the notice of appeal from the Court of Appeals of Ohio for Cuyahoga County, as filed with this Court on behalf of the appellant.

7) A copy of the opinion of this Court in this case.

8) A copy of the application for rehearing, as filed with this Court on behalf of the appellant.

9) A transcript of docket and journal entries of this Court in this cause, on the merits and on application for rehearing.

10) A transcript of all transcripts and evidence certified by the Board of Tax Appeals to the Court of Appeals of Ohio for Cuyahoga County, and certified in turn by that Court to this Court.

III. The following questions are presented by this appeal:

1. Does former Section 5701.08, Revised Code, deny the appellant equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States?

2. Does a statute which excepts from property tax, merchandise belonging to nonresidents when held for storage only, but taxes such merchandise belonging to residents deny residents equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States?

/s/ Carlton S. Dargusch, Attorney for Allied Stores of Ohio, Inc., Appellant, 33 North High Street, Columbus 15, Ohio.

[fol. 7] Proof of service (omitted in printing).

[fol. 8] Certificate of service (omitted in printing).

[fol. 10] [File endorsement omitted]

[fol. 11]

IN THE SUPREME COURT OF OHIO

ALLIED STORES OF OHIO, INC., Appellant,

v.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO, Appellee.

CERTIFICATE OF SUPREME COURT OF OHIO AS TO CONSTITUTIONAL QUESTION—Filed May 20, 1957

On motion of the appellant, Allied Stores of Ohio, Inc., it is ordered to be certified and made a part of the record of the proceedings and of the judgment of the Court in this cause that by its appeal from the Court of Appeals of Cuyahoga County, the appellant placed in issue the constitutionality of former Section 5701.08, Revised Code of Ohio, contending that the said Section as enacted and as construed and applied denied appellant (a resident corporation) equal protection of the laws in violation of Section 1 of the Fourteenth Amendment of the United States Constitution for the reason that it taxed storages only of resident corporations while excepting the same property of non-resident corporations, and that the Court found, pursuant to appeal, briefs and oral argument of counsel, that despite such alleged discrimination it was without jurisdiction to provide relief; that to do so would result in amending the Section to include Appellant within the exception; that therefore the Section must stand; that so standing [fol. 12] and so construed the Section was not repugnant to the United States Constitution or if repugnant, had nevertheless to be sustained in accordance with the intent of the General Assembly, even though discriminatory; and that this holding was appropriate and necessary to the Court's decision.

Witness The Honorable Supreme Court of Ohio, this 20 day of May, 1957.

Supreme Court of Ohio

/s/ Hon. Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio.

[fol. 14]

BEFORE THE DEPARTMENT OF TAXATION

OPINION AND ORDER—March 2, 1955

This proceeding being the application of Allied Stores of Ohio, Inc., an inter-county corporation, Cleveland, Ohio, for review and redetermination of an increased tangible personal property tax assessment for the year 1954, after being duly heard, came on to be considered.

The applicant herein, a domestic corporation, in making its inter-county return of taxable property for the year 1954, eliminated from the average value of its merchandise inventories reported therein an amount representing the value of merchandise held by it in storage warehouses for storage only. In support of the value so eliminated, the [fol. 15] applicant submitted with its return a separate schedule setting forth the monthly values of such stored property. The applicant also filed a claim for deduction from the book value of its furniture, fixtures, and equipment taxable in Schedule 4.

In passing upon the applicant's claim for deduction from the book value of its furniture, fixtures, and equipment, which claim was allowed in full, the separate schedule submitted by the applicant, with respect to merchandise in storage, was construed as a claim for deduction and the average monthly value reflected in such schedule was deducted from the average value of taxable merchandise inventories as reported by the applicant. This action resulted in a duplicate reduction for such property inasmuch as the applicant itself had eliminated the value of merchandise in storage from the average value of taxable inventories listed in Schedule 3A. Subsequently, the average value of merchandise held in storage for storage only was added back to the taxable value listed in Schedule 3A and an amended preliminary assessment certificate issued reflecting such action. The applicant filed this application for review and redetermination therefrom, contending that the statutes purported to levy a tax on merchandise and agricultural products of residents of this state held in storage warehouses for storage only were unconstitutional and void, in that, identical property of a nonresident is

excepted from taxation under the provisions of Section 5701.08, Revised Code, as construed in the case of The B. F. Goodrich Co. v. Peck, 161 Ohio St., 202.

Being fully advised in the premises, the Tax Commissioner finds that as an administrative official he is without authority to pass on the question of the constitutionality of the statutes here involved, such being the province of the courts alone. Cincinnati, W. & Z. R. Co. v. Clinton [fol. 16] County, 1 Ohio St., 77; State ex rel. Davis v. Hildebrant, 94 Ohio St., 154, 114 N. E., 55. Furthermore, the Tax Commissioner finds that as an administrative official, he must proceed in accordance with the terms and provisions of the statutes with which he is concerned with the assumption of their constitutionality. East Ohio Gas Co. v. Public Utilities Comm., 137 Ohio St., 225, 28 N. E. 2d, 599; Argo v. Kaiser, 66 O. L. Abs., 538, 118 N. E. 2d, 162. Thus, the Tax Commissioner finds no error in the assessment as made insofar as it purports to assess merchandise and agricultural products of the applicant held in storage warehouses for storage only since such property is subject to taxation under the provisions of Sections 5701.08, 5709.01, 5711.22 and correlated sections of the Revised Code. However, the Tax Commissioner finds that because of the duplicate reduction in applicant's taxable inventories hereinbefore explained, that the true average value of merchandise in storage has not as yet been assessed. Taking such fact into account and making proper allowances in applicant's taxable inventories as provided in Rule No. 222 of the Department of Taxation, the Tax Commissioner finds the true average value of applicant's inventories to be $6,784,927.00 for the year 1954.

The Tax Commissioner, being further advised, finds that the applicant's claim for deduction from the book value of its furniture, fixtures, and equipment was not well taken and that such claim should be, and the same hereby is, denied in its entirety. The Tax Commissioner also finds that applicant's net taxable credits and money and other taxable intangibles as listed were deficient as disclosed upon audit and that corrections therein are in order.

Giving effect to the findings made herein with respect to property of the applicant taxable in Schedules 4, 9, and

10, the Tax Commissioner finds that the true value of property taxable in such schedules for the year 1954 is as follows:

Schedule	True Value
4	$2,645,009.00
9	1,935,390.00
10	592,400.00

It is, therefore, the order of the Tax Commissioner that a corrected assessment certificate be issued in accordance with the findings made in this journal entry. Such certificate shall be final with respect to the assessment of all taxable property listed in the applicant's return.

[fol. 17] [File endorsement omitted]

[fol. 23]

BEFORE THE BOARD OF TAX APPEALS OF OHIO

STIPULATION OF FACTS—Filed June 1, 1955

It is stipulated and agreed by and between counsel for the respective parties hereto that the following may be considered and accepted as the facts for all purposes pertinent to the consideration and decision of the above case:

1. Allied Stores of Ohio, Inc., appellant herein, is a corporation organized and existing under and by virtue of the laws of the state of Ohio with its principal office at Euclid and 13th street, Cleveland, Ohio.

2. Appellant operates retail department stores and maintains warehouses in the cities of Akron, known as The A. Polsky Company; Cincinnati, known as The Rollman and Sons Co.; Cleveland, known as The Sterling Lindner Davis Company; and Columbus, known as Morehouse-Fashion Co. See Exhibits A, B, C, and D, attached hereto and made a part hereof.

3. The tax year in question is 1954, and the property covered thereby was listed as of January 31, 1954, except inventory, including inventory stored in storage ware-

houses, which was averaged for the twelve months covered by the fiscal year, February 1, 1953, to January 31, 1954, and such inventory including inventory stored in storage warehouses was assessed by appellee as taxable.

4. The warehouses in which inventory was stored by appellant were as follows:

(1) The A. Polsky Company warehouse in Akron is a private warehouse leased, operated and controlled by appellant. Exhibit A supra.

(2) The Rollman and Sons Co. warehouses in Cincinnati are private warehouses leased, operated and controlled by appellant. Exhibit B supra.

[fol. 23a] (3) The Sterling Lindner Davis warehouse in Cleveland is a private warehouse owned, operated and controlled by appellant. Exhibit C supra.

(4) The Morehouse-Fashion Co. warehouse in Columbus is a private warehouse leased, operated and controlled by appellant. Exhibit D supra.

5. The dollar value of the inventory carried in each of the foregoing warehouses is set forth in Exhibit E, attached hereto and made a part hereof, and is shown for the fiscal year beginning February 1, 1953 and ending January 31, 1954. All of said property was owned by the appellant.

6. The dollar value of the inventory carried in The A. Polsky Company warehouse in Akron was divided into two major groups as follows:

County: Summit
Taxing District: Akron

		Group 1	Group 2
January, 1954	$ 387,115	349,178	37,937
February, 1953	378,417	341,332	37,085
March, 1953	389,929	351,716	38,213
April, 1953	417,284	376,390	40,894
May, 1953	494,263	445,825	48,438
June, 1953	367,460	331,449	36,011
July, 1953	243,136	219,309	23,827
August, 1953	239,966	216,449	23,517

		Group 1	Group 2
September, 1953	239,988	216,469	23,519
October, 1953	187,533	169,155	18,378
November, 1953	267,046	240,876	26,170
December, 1953	198,826	179,341	19,485
Total Monthly Inventory	3,810,963	3,437,489	373,474
Average Monthly Inventory Value	317,580	286,457	31,123

[fol. 24] 7. The dollar value of the inventory carried in The Rollman and Sons Co. warehouse in Cincinnati consisted entirely of group 1 type merchandise, as follows:

County: Hamilton
Taxing District: Cincinnati

		Group 1
January, 1954	$ 275,830	275,830
February, 1953	283,380	283,380
March, 1953	283,390	283,390
April, 1953	263,898	263,898
May, 1953	236,180	236,180
June, 1953	186,090	186,090
July, 1953	254,580	254,580
August, 1953	297,130	297,130
September, 1953	326,630	326,630
October, 1953	333,410	333,410
November, 1953	314,900	314,900
December, 1953	265,950	265,950
Total Monthly Inventory	3,321,368	3,321,368
Average Monthly Inventory Value	276,780	276,780

Note: Items representing group 2 were warehoused within the retail store.

8. The dollar value of the inventory carried in The Sterling Lindner Davis Company warehouse in Cleveland was divided into two major groups, as follows:

County: Cuyahoga
Taxing District: Cleveland

		Group 1	Group 2
January, 1954	$ 320,668	286,228	34,440
February, 1953	364,299	325,173	39,126
March, 1953	397,766	355,046	42,720
April, 1953	397,590	354,889	42,701
May, 1953	411,818	367,589	44,229
[fol. 24a]			
June, 1953	393,720	351,434	42,286
July, 1953	381,860	340,848	41,012
August, 1953	351,424	313,681	37,743
September, 1953	355,689	317,488	38,201
October, 1953	430,625	384,376	46,249
November, 1953	419,682	374,608	45,074
December, 1953	356,778	318,460	38,318
Total Monthly Inventory	4,581,919	4,089,820	492,099
Average Monthly Inventory Value	381,826	340,818	41,008

9. The dollar value of the inventory carried in the Morehouse-Fashion Co. warehouse in Columbus was divided into two major groups, as follows:

County: Franklin
Taxing District: Columbus

		Group 1	Group 2
January, 1954	$ 150,453	127,885	22,568
February, 1953	170,263	144,724	25,539
March, 1953	168,855	143,527	25,328
April, 1953	185,847	148,678	37,169
May, 1953	187,934	150,347	37,586
June, 1953	168,370	134,696	33,674
July, 1953	171,660	145,911	25,749
August, 1953	179,229	152,345	26,884

		Group 1	Group 2
September, 1953	187,929	159,740	28,189
October, 1953	203,896	163,117	40,779
November, 1953	189,647	113,788	75,859
December, 1953	159,065	103,386	55,679
Total Monthly Inventory	2,123,148	1,688,144	435,004
Average Monthly Inventory Value	176,929	140,679	36,250

[fol. 25] 10. Group 1 in the A. Polsky, Rollman, Sterling Lindner Davis, and Morehouse-Fashion warehouses was composed of the following items:

Infants furniture, kitchen furniture, bulk housewares (such as unpainted furniture, step ladders, etc.), stoves, refrigerators, sinks, cabinets, dishwashers, washing machines and dryers, mattresses, television, radios, record players, floor coverings (such as linoleum, carpets and rugs), prepackaged sets of dinnerware, bulk toys, such as bicycles, gym sets, etc.; living room furniture, dining and bedroom furniture and miscellaneous casual furniture.

The items covered by Group 1 are those which normally would be sold to customers in the retail store from floor samples maintained therein and with respect to which sales deliveries were normally made to the customer from warehouse stocks.

11. Group 2 in the A. Polsky, Sterling Lindner Davis, and Morehouse-Fashion warehouses was composed of the following items:

Luggage, sporting goods (such as golf equipment, fishing equipment, etc.), pillows and blankets, miscellaneous wrought iron novelties such as are normally sold in the stationery department of a department store; paints, some miscellaneous sizes of small rugs, sanitary goods, toilet paper and soaps and venetian blinds.

The items covered by Group 2 are those which normally would be sold to customers in the retail store and delivered

to the customer from stocks of merchandise maintained in the retail store and transferred from the warehouse to the retail store for that purpose.

12. All the items of merchandise stored in the several warehouses of appellant were finished products in condi- [fol. 25a] tion for sale to the ultimate consumer. The items stored, being held (a) for ultimate distribution to the retail department stores of appellant (Group 2), or (b) ultimate delivery to customers as the result of sales made to customers at the retail stores of appellant (Group 1). No sales were made to customers directly from warehouse stocks of merchandise. None of the items stored in the said warehouses were manufactured by appellant, but all were purchased from suppliers located both within and without Ohio.

13. The foregoing constitutes all of the facts to be offered by either of the parties hereto in these proceedings.

C. William O'Neill, Attorney General, State of Ohio, Larry H. Snyder, Assistant Attorney General, State of Ohio, Attorneys for the Tax Commissioner, State of Ohio.

Carlton S. Dargusch, Sr., Attorney for Allied Stores of Ohio, Inc.

CLERK'S NOTE:

For exhibits to stipulation see end of record.

BEFORE THE BOARD OF TAX APPEALS OF OHIO

OPINION AND ORDER—August 18, 1955

This appeal is from a final order of the Tax Commissioner made on March 2, 1955. In and by this order, issued upon an application for review and redetermination, the commissioner made an increased personal property tax assessment against the taxpayer for the year 1954.

The cause now comes on for further and final consideration upon the commissioner's transcript, appellant's notice

of appeal, the record of a hearing had before this board on June 1, 1955, a stipulation of facts, certain exhibits and briefs of counsel.

[fol. 26] Appellant's counsel, in the course of his opening statement, succinctly states the taxpayer's complaint, and the question that is now before this board. He says:

> "In the notice of appeal we raise two questions, one of which we do not desire to present, as we wish to present but a single question to the Board in the Allied Stores case. The matter upon which we will go forward is that which involves the taxability of the storage merchandise held by taxpayer, a domestic corporation, in storage warehouses for storage only within the meaning of the statute.
>
> "It is our contention that the statutes of Ohio which purport to levy a tax on the storage inventory of this taxpayer discriminates against it and deny taxpayer the equal protection of the laws under both the state and Federal constitutions in that property of the same kind when held by a non resident is excepted from taxation under the so-called Goodrich case. (Goodrich Company v. Peck, 161 O. S. 202).
>
> "We have raised a question also, as I indicated, of the value of furniture and fixtures which is a question of fact which we do not intend to go forward with, and we will present only the legal question that is involved in the storage merchandise.
>
> "I think there are two problems there. One, whether the merchandise in question is held in the storage warehouse for storage only within the meaning of the statute; and, secondly, whether the statutes which purport to levy a tax on that property are unconstitutional in that they deny taxpayer the equal protection of the laws."

[fol. 26a] It, therefore, appears that appellant abandons all other complaints, save the two questions noted.

The only real point of difference between the present case and that of the Goodrich case, supra, lies in that appellant is a domestic, or an Ohio corporation, engaged exclu-

sively in merchandising, while The Goodrich Company is a nonresident manufacturing corporation. After again re-examining the decisions of the court in General Cigar Co., Inc., v. Peck, 159 O. S., 152, and Goodrich Co. v. Peck, supra, the Board of Tax Appeals is of the opinion that appellant's first problem must be answered in the affirmative.

Since appellant's principal query concerns a matter of discrimination and the constitutionality of Revised Code Section 5701.08 (General Code Section 5325-1), matters over which this board is without jurisdiction to consider, this board can do nothing else but to affirm the Tax Commissioner's order as made, which is hereby accordingly done.

[fol. 31]

IN THE COURT OF APPEALS, CUYAHOGA COUNTY, OHIO

OPINION

(Supreme Court Case No. 34926)

"Judgment affirmed. The property, under the agreed facts, was 'kept on hand—as merchandise' and 'held as means—for carrying on the business' of the appellant and was thus 'used in business' in the State of Ohio (Sec. 5701.08 R. C.) and consequently came within the purview of Section 5709.01 R. C. and was taxable as 'personal property located and used in business in that state.' The positive statement in Section 5701.08 R. C. that 'products belonging to a non-resident of this state is not used in business in this state if held in a storage warehouse for storage only' is not an arbitrary or artificial classification and is within the right and power of the legislature to declare. See City of Xenia v. Schmidt, 101 O. S. 437; Travellers' Ins. Co. v. Connecticut, 185 U. S. 364. Goodrich Co. v. Peck, 161 O. S. 202, in effect so holds. We decide, therefore, that the decision of the Board of Tax Appeals was neither unreasonable nor unlawful. Exceptions. Order see journal."

[fol. 32]

IN THE COURT OF APPEALS, CUYAHOGA COUNTY, OHIO

JOURNAL ENTRY OF JUDGMENT—Filed May 21, 1956

(Supreme Court Case No. 34926)

This cause came on to be heard on the appeal of the appellant under the provisions of Section 5717.04, Revised Code, from the decision of the Board of Tax Appeals entered August 18, 1955, and the same was submitted to the court upon the certified transcript of the record of the proceedings before the board, and the briefs and arguments of counsel, and the court upon consideration thereof finds that the decision of the Board of Tax Appeals is reasonable and lawful and that said decision should be affirmed.

It is therefore ordered, adjudged and decreed that said decision of the Board of Tax Appeals be and the same hereby is affirmed. It is further ordered that the costs of this appeal be taxed against the appellant.

To all of which appellant excepts.

[fol. 37]

IN THE SUPREME COURT OF OHIO

Case No. 34926

ALLIED STORES OF OHIO, INC., Appellant,

v.

STANLEY J. BOWERS, Tax Commissioner, Appellee.

OPINION—January 30, 1957

Statutory Construction—Limiting Language Repugnant to Constitution—Court Cannot Cure Invalidity by Striking Such Language, When—Taxation—Discrimination—Property "Used in Business" Limited—Merchandise of Nonresident Held for Storage, Excepted.

Although a legislative enactment may be invalid merely because certain limiting language therein makes it repugnant to constitutional limitations, a court cannot cure such invalidity merely by striking such limiting language, where the elimination of such limiting language would substantially extend the operation of the legislative enactment beyond the scope contemplated by all the language of such legislative enactment.

Decided January 30, 1957.

Appeal From the Court of Appeals for Cuyahoga County.

Allied Store (sic) of Ohio, Inc., herein referred to as the taxpayer, is an Ohio corporation. In an appeal to the Board of Tax Appeals from a final order of the Tax Commissioner, the taxpayer contended that the Tax Commissioner had [fol. 38] erroneously assessed for taxation for the year 1954 certain "merchandise * * * held in a storage warehouse for storage only" within the meaning of those words as used in Section 5701.08, Revised Code, in effect prior to September 30, 1955, and that the statutes of Ohio were unconstitutional to the extent that they purported to levy a tax on such property not "belonging to a nonresident of" Ohio, in that they denied a resident such as the taxpayer the protection of the laws equal to that enjoyed by a nonresident. See *Little* v. *Smith, Atty. Genl.*, 124 Kan., 237, 257 P., 959, 57 A. L. R., 100; *Colgate* v. *Harvey*, 297 U. S., 404.

Section 5709.01, Revised Code, reads so far as pertinent:

"* * * All personal property located and used in business in this state * * * are subject to taxation, regardless of the residence of the owners thereof."

Section 5701.08, Revised Code, prior to September 30, 1955, read so far as pertinent:

"(A) Personal property is 'used' within the meaning of 'used in business' * * * when acquired or held as means or instruments for carrying on the business * * * or when stored or kept on hand as material, parts, products, or merchandise; but merchandise or agricultural products belonging to a nonresident of this state is (are) not used in

business in this state if held in a storage warehouse for storage only."

In its final entry, the Board of Tax Appeals stated in part:

"The only real point of difference between the present [fol. 39] case and that of the *Goodrich case* * * * (161 Ohio St., 202, 118 N. E. (2d), 525) lies in that appellant is a domestic, or an Ohio corporation, engaged exclusively in merchandising, while the Goodrich company is a nonresident manufacturing corporation. * * *

"Since appellant's principal query concerns a matter of discrimination and the constitutionality of Revised Code Section 5701.08 * * *, matters over which this board is without jurisdiction to consider, this board can do nothing else but to affirm the Tax Commissioner's order as made * * *."

In affirming the decision of the Board of Tax Appeals, the Court of Appeals stated in part:

"The positive statement in Section 5701.08, Revised Code, that 'products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only' is not an arbitrary or artificial classification and is within the right and power of the Legislature to declare. See *City of Xenia* v. *Schmidt*, 101 Ohio St., 437 (130 N. E., 24); *Travelers' Ins. Co.* v. *Connecticut*, 185 U. S., 364. *Goodrich Co.* v. *Peck*, 161 Ohio St., 202 (118 N. E. (2d), 525), in effect so holds."

The cause is now before this court on appeal from the judgment of the Court of Appeals as a case involving a debatable constitutional question and pursuant to allowance of a motion to certify the record.

[fol. 40] OPINION: Taft, J.

Ordinarily, a constitutional question will not be considered unless it is necessary to consider such constitutional question in deciding the case before the court. In our opinion, it is not necessary to consider the constitutional question raised by the taxpayer in the instant case because, if its contention with regard to that question is sound, it

necessarily leads to the conclusion that the entire proviso in subdivision (A) of Section 5701.08, which read, "but merchandise or agricultural products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only," was void and should be stricken. That being so, it is apparent that any of taxpayer's "merchandise * * * held in a storage warehouse for storage only" would be taxable because described by the preceding words remaining in the statute and reading, "stored * * * as * * * merchandise."

Of course, if only that portion of the proviso after the semicolon in subdivision (A) of Section 5701.08, which read, "belonging to a nonresident of this state," is stricken, the discrimination between residents and nonresidents would be eliminated; and then the proviso would prevent taxation of the taxpayer's "merchandise * * * held in a storage warehouse for storage only." However, the question remains as to the power of this court to effect that result by striking only that portion of the proviso. In other words, if we assume that the taxpayer's contention that the dis- [fol. 41] crimination between nonresidents and residents contemplated by the words of the proviso would deny a resident the equal protection of the laws and must be eliminated, has this court the power to eliminate that discrimination by striking only that portion of the proviso reading, "belonging to a nonresident of this state"? If it does not have that power, the whole proviso must be stricken in order to eliminate that discrimination and then the taxpayer would obviously have nothing upon which to base its claim for the relief which it seeks.

Although a legislative enactment may be invalid merely because certain limiting language therein makes it repugnant to constitutional limitations, a court cannot cure such invalidity merely by striking such limiting language, if the elimination of such limiting language would substantially extend the operation of the legislative enactment beyond the scope contemplated by all the language of such legislative enactment.

In the opinion by Welch, J., in *State, ex rel., McNeal* v. *Dombaugh, Clerk,* 20 Ohio St., 167, 174, it is said:

"It is by a mere figure of speech that we say an unconstitutional provision of a statute is 'stricken out.' For all the purposes of construction it is to be regarded as part of the act. The *meaning* of the Legislature must be gathered from all they have said, as well from that which is ineffective for want of power, as from that which is authorized by law."

In *State, ex rel. Wilmot,* v. *Buckley,* 60 Ohio St., 273, 296, 54 N. E., 272, it is said in the opinion by Burket, J.:

[fol. 42] "* * * the court has no lawmaking power, and cannot extend a statute over territory from which it is excluded by the General Assembly. A court can hold a whole act unconstitutional because it is not broad enough * * *; but it cannot extend an act which is too narrow, so as to take in territory which was left out by the General Assembly."

In 11 American Jurisprudence, 855, Section 161, it is said:

"One important class of cases in which questions as to the severability of valid and invalid portions of an act and the determination of the legislative intent are involved consists of statutes containing invalid exceptions or provisos. The general rule is that if such a proviso operates to limit the scope of the act in such a manner that by striking out the proviso, the remainder of the statute would have a broader scope either as to subject or territory, then the whole act is invalid, because such extended operation would not be in accordance with the legislative intent."

See also *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S., 540, 46 L. Ed., 679, 22 S. Ct., 431; *State, ex rel., Wilson, Solr.,* v. *Lewis, Aud.,* 74 Ohio St., 403, 78 N. E., 523; *State, ex rel., Squire, Supt. of Banks,* v. *City of Cleveland,* 150 Ohio St., 303, 336, 82 N. E. (2d), 709; *State, ex rel., English* v. *Industrial Commission,* 160 Ohio St., 215, 217 *et seq.,* 115 N. E. (2d), 395; but see *State, ex rel.,* v. *Baker,* 55 Ohio St., 1, 44 N. E., 516.

In the instant case, we do not have a legislative situation where the proviso was merely enacted as a part of a statute [fol. 43] defining the objects to be subject to taxation. In such an instance, striking the words "belonging to a non-

resident of this state" would merely prevent the tax from being extended as far as the General Assembly intended. By doing that, this court would not be extending the operation of the statute so as to cover subjects or objects that the General Assembly did not intend to cover.

However, in the instant case, these taxing statutes, as originally enacted in 1931 (114 Ohio Laws, 714), did not contain the proviso which the taxpayer must necessarily rely upon for any relief *after* it has had this court remove from it the portion which it contends was invalid. The proviso was added by an amendment to the statute in 1933 (115 Ohio Laws, 548). See annotation, 66 A. L. R., 1483. Cf. *Frost* v. *Corporation Commission of Oklahoma,* 278 U. S., 515, 525, 73 L. Ed., 483, 49 S. Ct., 235; *Reitz* v. *Mealey, Commr.,* 314 U. S., 33, 38, 39, 86 L. Ed., 21, 62 S. Ct., 24; 11 American Jurisprudence, 841, 856, 857, Sections 154, 161. Prior to that amendment, the General Assembly had expressed an intention to tax any property "when stored or kept on hand as * * * merchandise." The amendment dealt with a withdrawal of some of that property from such taxation. The General Assembly provided only for withdrawal of "merchandise or agricultural products belonging to a nonresident." It did not provide for anything with respect to such merchandise or agricultural products belonging to a resident. If this court merely strikes the words "belonging to a nonresident of this state," the effect of that would be to provide for such a withdrawal of "merchandise or [fol. 44] agricultural products" belonging to a resident; and it would thereby be substantially *extending* the operation of the legislative enactment beyond the scope contemplated by the legislative language. As the taxpayer recognizes in its reply brief, its contention is that "the *failure* of the Legislature *to extend* the exception to residents is" what was unconstitutional. By merely striking the words "belonging to a nonresident of this state," this court in effect would be exercising a legislative power which it does not have.

Therefore, if we assume that the proviso was unconstitutional and invalid because it denied to residents a protection of the laws equal to that enjoyed by nonresidents, it would be necessary to strike the whole proviso to elim-

inate that invalidity. If that is done, the taxpayer would not be entitled to any relief. It follows that the judgment of the Court of Appeals must be affirmed.

Judgment affirmed.

Stewart, Bell, Matthias and Herbert, JJ., concur.

Weygandt, C.J., and Zimmerman, J., concur in the judgment.

[fol. 45]

IN THE SUPREME COURT OF OHIO

Case No. 34926

APPLICATION FOR REHEARING—Filed February 13, 1957

Appellant, Allied Stores of Ohio, Inc., applicant herein, respectfully requests rehearing of *Allied Stores of Ohio, Inc.*, v. *Bowers*, 166 Ohio St., 116, for the following reasons:

First, the court declined to determine, and as a consequence neither resident corporations nor the commissioner are yet certain, if the rule announced in *General Cigar Co., Inc.* v. *Peck*, 159 Ohio St., 152, and *B. F. Goodrich Co.*, v. *Peck*, 161 Ohio St., 202, ever applies to storages only of resident corporations.

Second, the decision leaves unanswered one of the principal issues, whether the court will follow *General Cigar Co., Inc.*, v. *Peck*, 159 Ohio St., 152, and *B. F. Goodrich Co.*, v. *Peck*, 161 Ohio St., 202. To settle this question the commissioner or taxpayers will now have to pursue appeal in the cases presently pending before The Board of Tax Appeals involving assessments against storages only of foreign corporations. There must be a final determination of the problem so that taxpayers will not be liable continually to deficiency assessments by the commissioner for past years.

Third, the present decision carries with it the unavoidable implication that, although resident corporations are discriminated against by Section 5701.08, Revised Code, [fol. 46] such discrimination must stand because the court

is powerless to remove the classifying feature of the exception, even though removal would admittedly eliminate the discrimination. We cite in particular the language appearing on page 118, of *Allied Stores of Ohio, Inc.*, v. *Bowers*, 166 Ohio St., 116:

> "Of course, if only that portion of the proviso after the semicolon in subdivision (A) of Section 5701.08, which read 'belonging to a nonresident of this state,' is stricken, the discrimination between residents and nonresidents would be eliminated; and then the proviso would prevent taxation of the taxpayer's 'merchandise * * * held in a storage warehouse for storage only.'"

Fourth, the decision of the court assumes that if it should act to correct the discrimination, it would be required to remove the entire exception. The authorities noted in the decision would prohibit extension of the tax by removal of the entire exception as much as they would prohibit removal of specific language within the exception. Before the exception could be taken from the statute by judicial construction, it would first have to be shown that the legislature would acquiesce in the resultant extension of the tax to all storages; that it would not, is proved by the fact that the statute, after the most recent amendment, still does not tax all storages. More importantly, though, removal of the exception was not an issue. Applicant could have had no standing to seek the overthrow of the rights of foreign corporations under the exception, and the commissioner, who is charged with administering the statute as written could have had no standing to challenge the legislature in granting the exception. The single question before the court was whether, in light of the exception given to foreign [fol. 47] corporations, residents should be accorded equal treatment by being relieved of the tax imposed upon them.

Fifth, the Supreme Court always has jurisdiction to consider the whole statute and to declare that insofar as it *imposed* a tax discriminatorily it was, *pro tanto*, unconstitutional. The court's understanding that it must accept the exception as enacted was not proper cause for failure

to examine the entire section and to declare it discriminatory to the extent it imposed the tax on residents while at the same time excepting nonresidents from taxation.

Sixth, applicant concludes that if the exception for storages only of non-residents cannot be disturbed, since that would result in levying a tax on persons and property which the legislature has declared shall not be taxed, and if the limitation within the exception may not be removed, since that would result in amending the exception, then the court must decide whether the positive provisions of Section 5701.08, Revised Code, imposing the tax on all storages of residents, including storages only, creates an unconstitutional classification within the section read as a whole. The decision of the court comes to the point where it should take (sic) resolve the problem of discrimination and instead it stops. The matter therefore stands at a stalemate with applicant being discriminated against, or at least not knowing whether it is being discriminated against as a matter of law, but nevertheless forced to pay the tax.

[fol. 48] For the enumerated reasons above stated, applicant respectfully requests rehearing in this case.

/s/ Carlton S. Dargusch, Sr., /s/ Jack H. Bertsch.

[fol. 49] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 50]

IN THE SUPREME COURT OF THE STATE OF OHIO

JOURNAL ENTRIES

Tuesday, June 25, 1957. Journal No. 42, p. 353.

The appellant, Allied Stores of Ohio, Inc., is herewith for good cause shown, granted an extension of time until August 3 for the docketing of this case and the filing of the record and jurisdictional statement. Carl V. Weygandt, Chief Justice.

Monday, July 29, 1957. Journal No. 42, p. 369.

The appellant, Allied Stores of Ohio, Inc., is herewith for good cause shown, granted an extension of time until September 30 for the docketing of this case and the filing of the record and jurisdictional statement. Carl V. Weygandt, Chief Justice.

Tuesday, October 1, 1957. Journal No. 42, p. 393.

The appellant, Allied Stores of Ohio, Inc., is herewith for good cause shown, granted an extension of time until October 31 for the docketing of this case and the filing of the record and jurisdictional statement. Carl V. Weygandt, Chief Justice.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 54] EXHIBIT C

Premier Map of City of Cincinnati, Ohio

(See Opposite) ☞

Note

Only the pertinent portion of map Exhibit is being included here.

THE PREMIER STREET MAP

of

CINCINNATI

ALEXANDER GROSS F.R.G.S.

HOUSE NUMBERS
TRANSIT LINES
POSTAL ZONES
STREET INDEX
ONE-WAY STREETS
ETC.

50c

Published by GEOGRAPHIA MAP CO., Inc.
145 W. 57th ST., NEW YORK 19, N.Y.

[fol. 51]

SUPREME COURT OF THE UNITED STATES

Nos. 588 and 589, October Term, 1957

[Title omitted]

Appeals from the Supreme Court of the State of Ohio.

ORDER NOTING PROBABLE JURISDICTION—January 6, 1958

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours allowed for oral argument.


DAYTON
NEWPORT
OHIO
RIVER
WOODLA
LAUREL
AV.
HOMES
KENNER
HOPKINS
CLARK
COURT
SEVENTH
KENYON
FINDLAY
POPLAR
LIBERTY
WADE
FLINT
OLIVER
YORK
DAYTON
HULBERT AV.
ARMORY
CENTRAL
GILBERT
COLUMBIA
COLUMBIA
COURT
SECOND ST.
FRONT
WATER
COMMERCE ST.
PUBLIC LANDING
RIVERSIDE DR.
SPRING ST.
W. 2ND
W. 3RD
MONTCLAIR
RIVER
RD.
POST PL.
LINCOLN
RUN
CHESAPEAKE
GRAND
WATERWORKS
INCINERATOR
HARRISON
BLACKBURN
DAYTON
10
3
2

[fol. 52] EXHIBIT A

Premier Map of City of Akron, Ohio

(See Opposite) ☞

Note

Only the pertinent
portion of map Exhibit
is being included here.

THE PREMIER STREET MAP

of

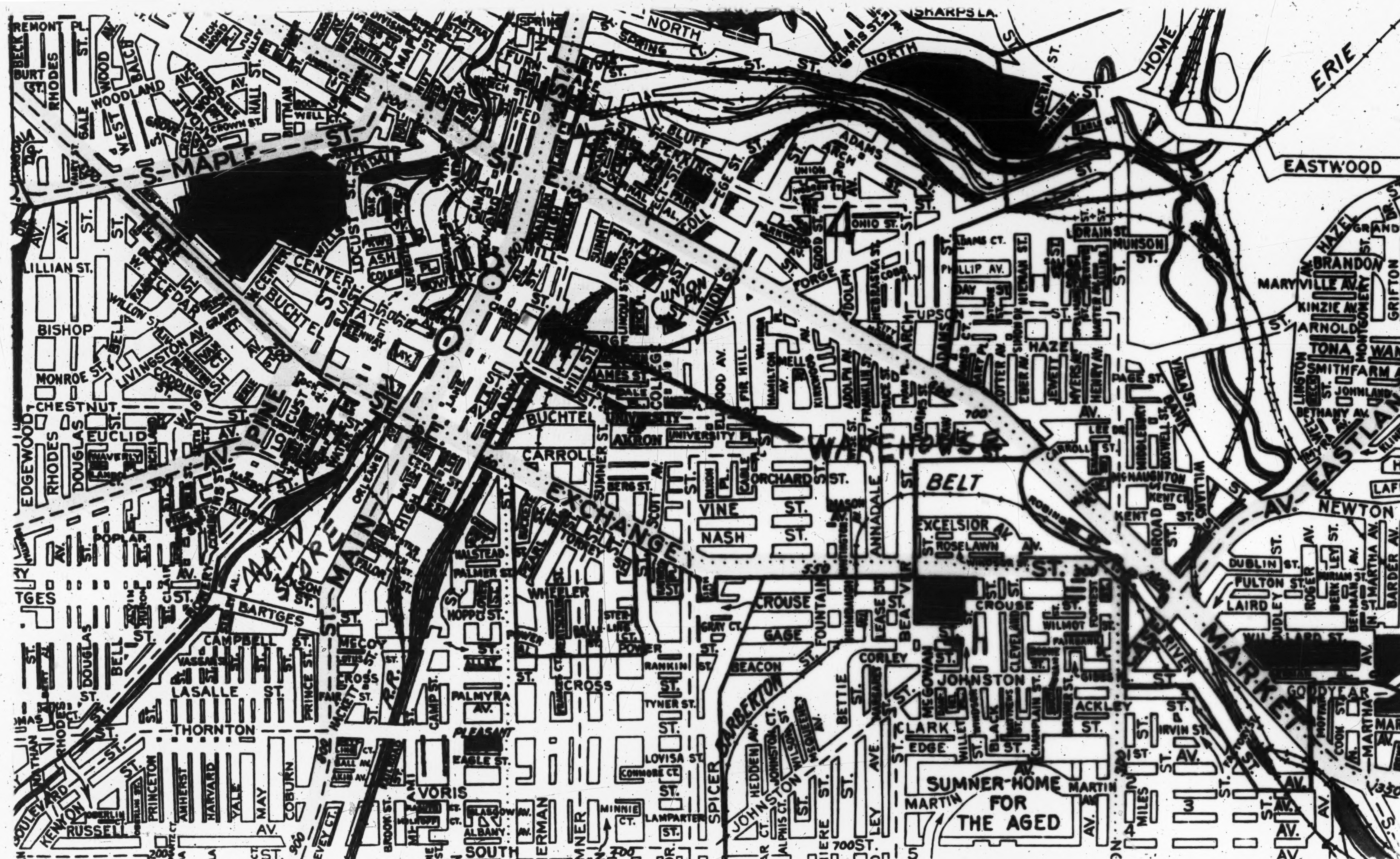
AKRON

ALEXANDER GROSS F.R.G.S.

HOUSE NUMBERS
TRANSIT LINES
POSTAL ZONES
STREET INDEX
ETC.

50c

Published by GEOGRAPHIA MAP CO., Inc.
145 W. 57th ST., NEW YORK 19, N.Y.



NORTH
SPRING
NORTH
ST.
HOME
ERIE
EASTWOOD
S. MAPLE
BLUFF
PERKINS
ADAMS
UNION
ONIO ST.
FORGE
WOODLAND AV.
WOOD
BALCH
RHODES
BURT
BECK
LILLIAN ST.
BISHOP
MONROE ST.
CHESTNUT
EUCLID
EDGEWOOD
RHODES
DOUGLAS
WAVERLY
CENTER
LOCUST
BUCHTEL
STATE
CEDAR
LIVINGSTON AV.
ASH
ADOLPH
UPSON
HAZEL
PHILLIP AV.
DAY
LORAIN ST.
MUNSON ST.
BRANDON
MARYVILLE AV.
KINZIE AV.
ARNOLD
TONA
SMITHFARM AV.
JOHNLAND
BETHANY AV.
GRIFTON
HAZEL
EASTLAND
NEWTON
BUCHTEL
CARROLL
AKRON
UNIVERSITY PL.
WAREHOUSE
BELT
ORCHARD
VINE ST.
NASH ST.
EXCHANGE
EXCELSIOR AV.
ROSELAWN AV.
ANNADALE
CARROLL ST.
MCNAUGHTON
KENT ST.
BROAD
AV.
DUBLIN ST.
FULTON ST.
LAIRD
DUDLEY
ROGER
MARTHA AV.
BARDER AV.
WILLARD ST.
GOODYEAR
MARY AV.
MARKET
RIVER
CROUSE
GAGE
FOUNTAIN
LEASE
CORLEY
BEACON
JOHNSTON
ACKLEY
CLARK
EDGE
BARBERTON
SPICER
JOHNSTON
BETTIE
SUMNER HOME FOR THE AGED
MARTIN
MILES
POPLAR
BARTGES
CAMPBELL
VASSAR
LASALLE ST.
THORNTON
DOUGLAS
BELL
PRINCE ST.
PRINCETON
AMHERST
HARVARD
YALE
MAY
COBURN
RUSSELL AV.
KENYON
BOULEVARD
MAIN
HIGH
BROADWAY
WHEELER
HALSTEAD
PALMER ST.
POWER
MCCOY
CROSS
PALMYRA AV.
CAMP ST.
PLEASANT
EAGLE ST.
VORIS
GLASGOW AV.
ALBANY
SOUTH
MINNIE CT.
LAMPARTER ST.
LOVISA ST.
TYNER ST.
RANKIN ST.
CROSS
BERG ST.
SCOTT AV.
SUMNER ST.
ST.
700
550

[fol. 53] EXHIBIT B

Premier Map of City of Cleveland, Ohio

(See Opposite) ☞

Note

Only the pertinent portion of map Exhibit is being included here.

[fol. 55] EXHIBIT D

Premier Map of City of Columbus, Ohio

(See Opposite) ☞

Note

Only the pertinent portion of map Exhibit is being included here.

THE PREMIER STREET MAP

of

CLEVELAND

RECENTLY REVISED
UP-TO-DATE
HOUSE NUMBERS
TRANSIT LINES
POSTAL ZONES
STREET INDEX

50c

Published by GEOGRAPHIA MAP CO., Inc.
145 W. 57th ST., NEW YORK 19, N.Y.

THE PREMIER STREET MAP

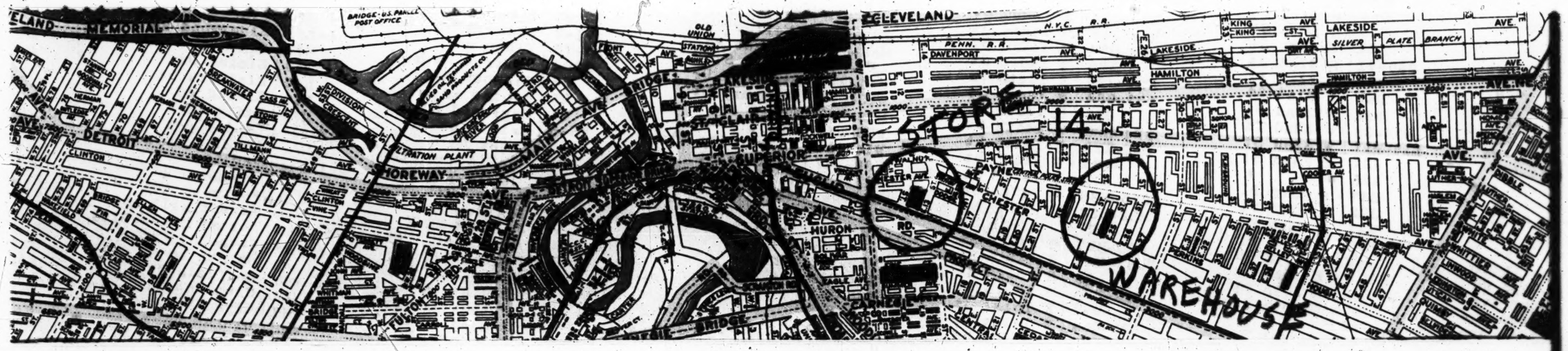
of

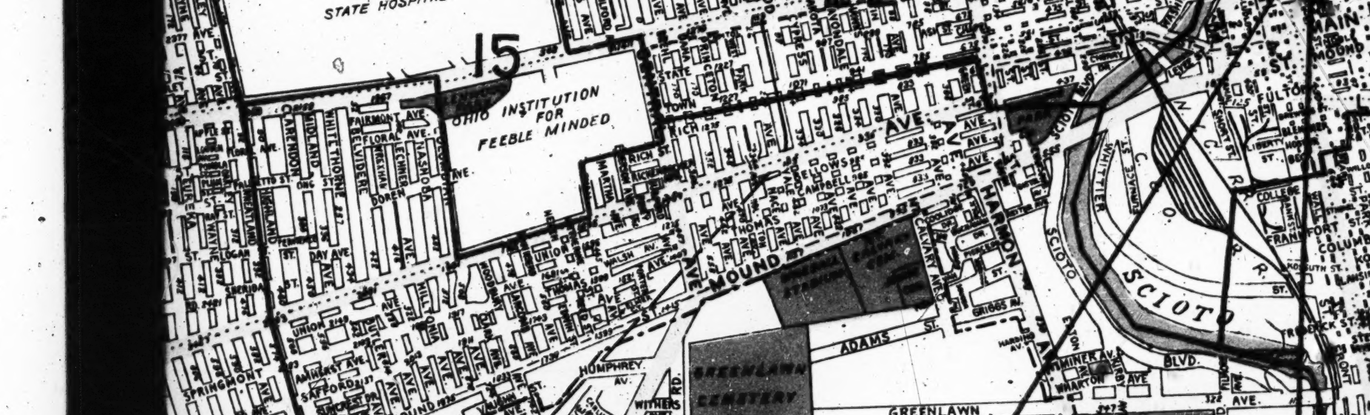
COLUMBUS

RECENTLY REVISED
UP-TO-DATE
HOUSE NUMBERS
TRANSIT LINES
POSTAL ZONES
STREET INDEX

50¢

Published by GEOGRAPHIA MAP CO., Inc.
145 W. 57th ST., NEW YORK 19, N.Y.





64.	Osborn Building	H11
65.	Palace Theatre	H13
66.	Park Building	F8
67.	Penton Building	C7
68.	Perry-Payne Building	E6
	Post Office	F6
	Public Auditorium	C9
	Public Library	E9
	Public Square	E-F7-8
72.	Rockefeller Building	E6
73.	Rose Building	G10
	St. Johns Cathedral	E11
74.	Schofield Building	G10
76.	Society for Savings Building	E8
	Stadium	A7-8
77.	Standard Building	E8
78.	State Theatre	H13
79.	Statler Hotel	G11
80.	Sterling Lindner Davis	G12
81.	Stillman Theatre	G11
84.	Taylor Sons & Company	G9
85.	Terminal Tower Building	F7
86.	Truman Building	G11
	Union Bank of Commerce	G11

No. [redacted] 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Appeal from the Supreme Court of Ohio

ALLIED STORES OF OHIO, INC.,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

JURISDICTIONAL STATEMENT

CARLTON S. DARGUSCH, SR.,
33 N. High St., Columbus 15, Ohio,
Attorney for Appellant.

WILLIAM SAXBE,
Attorney General,
JOHN M. TOBIN,
Assistant Attorney General,
State House, Columbus 15, Ohio,
Attorneys for Appellee.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

INDEX

Table of Cases.

Texts Cited

Statutes Cited

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. .....

ALLIED STORES OF OHIO, INC.,

Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

JURISDICTIONAL STATEMENT

Appellant appeals from a judgment of the Supreme Court of Ohio, entered January 30, 1957, affirming the Court of Appeals, Cuyahoga county, Ohio. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal, and that a substantial question is presented.

I

REFERENCE TO OPINIONS BELOW

The decision of the Board of Tax Appeals in this cause was journalized August 18, 1955, being Case No. 28440, on the board's docket (unreported, see Appendix II).

The decision of the Court of Appeals, Cuyahoga county, Ohio was journalized May 21, 1956, being Case No. 23663, on the court's docket (unreported, see Appendix III).

The decision of the Supreme Court of Ohio was journalized January 30, 1957, *Allied Stores of Ohio, Inc., v. Bowers*, 166 Ohio St. 116, 140 N. E. (2d) 411, (see Appendix IV). Rehearing denied February 20, 1957.

II

STATEMENT OF GROUNDS OF JURISDICTION

Proceedings leading to this appeal began when the Tax Commissioner of Ohio issued a preliminary assessment against appellant's storage merchandise. The commissioner affirmed the assessment on March 2, 1955 (see Appendix I).

Appellant appealed to the Board of Tax Appeals of Ohio, which held that although the appellant's merchandise was for storage only, the board had no jurisdiction to declare the taxing statute unconstitutional, and accordingly affirmed the assessment.

Subsequently, within time, appeal was filed with the Court of Appeals of Cuyahoga county, which sustained the statute as constitutional, and thereupon affirmed the board.

An appeal as of right was then taken to the Ohio Supreme Court and was allowed on October 3, 1956. On the same date the court also certified the constitutional ques-

tion as substantial and involving great general public interest. Pursuant to such appeal and certification, and upon briefs and argument, the Supreme Court affirmed the Court of Appeals. Notice of appeal to the Supreme Court of the United States was filed with the Supreme Court of Ohio on April 30, 1957.

III

STATUTES AND CASES

This is an appeal taken under 28 U.S.C.A., Section 1275 (2), and the cases believed to sustain the court's jurisdiction are the same as those cited in the jurisdictional statement submitted in *Youngstown Sheet and Tube Company v. Bowers*, companion to this case.

The challenged statute is Section 5701.08, Revised Code of Ohio, (Title 57, *Page's Ohio Revised Code Annotated*, page 13; Vol. 6, *Baldwin's Ohio Revised Code and Service*, Title 57, page 5), which provides in full:

> "(A) Personal property is 'used' within the meaning of 'used in business' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, *or when stored or kept on hand as material, parts, products, or merchandise; but merchandise or agricultural products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only.* Moneys, deposits, investments, accounts receivable, and prepaid items, and other taxable intangibles are 'used' when they or the avails thereof are being applied, or are intended to be applied, in the conduct of the business, whether in this state or elsewhere.
>
> "(B) 'Business' includes all enterprises conducted for gain, profit, or income and extends to personal service occupations." (Emphasis added)

IV

QUESTIONS PRESENTED

Does a statute deny residents of the state equal protection of laws under the Constitution of the United States by imposing a property tax upon residents' storage merchandise held for storage only, while at the same time excepting the storage merchandise of nonresidents when held for storage only?

V

STATEMENT OF CASE

A. Material Facts

The facts have been stipulated, see Appendix V.

Allied Stores of Ohio operates retail department stores in Akron, Cincinnati, Cleveland and Columbus. During 1953 and part of 1954 it maintained central warehouses in the above cities from which it supplied its various stores. The items stored were retail merchandise in finished form. No manufacturing or processing of the merchandise was carried on, and the merchandise was simply held in storage pending future disposition.

B. Stage at Which the Constitutional Question Was Raised

Appellant raised its constitutional objection in its notice of appeal to the Board of Tax Appeals of Ohio by assigning the following error:

> "2. Appellee erred in including, as taxable, agricultural products and merchandise belonging to appellant and held for storage only in this state for the reason that like property beyonging to a nonresident is

excepted from taxation by Section 5701.08 of the Revised Code, and same section (and related sections), purporting to levy a tax on agricultural products and merchandise belonging to residents of this state and held for storage only, is, therefore, unconstitutional and void in that it denies appellant the equal protection of the laws to which appellant is entitled under the Constitution of the state of Ohio and the Constitution of the United States."

The Board of Tax Appeals, being without jurisdiction to do otherwise, sustained the statute.

Upon the record before the board, including the above assignment of error, the appellant filed its notice of appeal with the Court of Appeals, citing as error:

"1. Section 5701.08, Revised Code, under which merchandise held by appellant for storage only was assessed by the Tax Commissioner, denies appellant equal protection of the laws and is therefore unconstitutional."

That court entered a paragraph opinion from which we quote:

"The positive statement in Section 5701.08, Revised Code, that 'products belonging to a non-resident of this state is not used in business in this state if held in a storage warehouse for storage only' is not an arbitrary or artificial classification and is within the right and power of the legislature to declare."

From this decision an appeal was taken to the Supreme Court of Ohio. The following errors were listed in the assignment of errors accompanying the notice of appeal:

"The Court of Appeals erred in the following respects:

"1. By holding that merchandise held by appellant in storage warehouses for storage only was used in business;

"2. By holding that Section 5701.08 of the Revised Code, on its face, does not deny residents equal protection of the laws;

"3. By holding that the assessment for tax of merchandise held by appellant, a domestic corporation, in storage warehouses for storage only did not deny appellant equal protection of the laws;

"4. By holding that Section 5701.08 of the Revised Code as applied to merchandise held by appellant, a domestic corporation, in storage warehouses for storage only so as to tax said merchandise did not deny appellant equal protection of the laws."

Wherefore, appellant requested that the Supreme Court of Ohio "allow this appeal on the federal and Ohio constitutional questions involved."

The Tax Commissioner on his behalf moved to dismiss the appeal:

"Comes now the appellee, Stanley J. Bowers, Tax Commissioner of Ohio, and moves this Court that the appeal as of right upon a constitutional question be dismissed for the reason that no substantial question under the Constitution of the State of Ohio or of the United States is there presented."

By journal entry dated October 3, 1956, the Ohio Supreme Court overruled the commissioner's motion and allowed the appeal of the constitutional question as of right. On the same date, it also journalized an entry certifying the question as substantial and of great public general interest. tion as substantial and of great general public interest.

The appeal having been allowed, the cause was briefed and argued to the court, and on January 30, 1957 decision was rendered sustaining the constitutionality of the statute. We quote from the court's syllabus:

"Although a legislative enactment may be invalid merely because certain limiting language therein makes

it repugnant to constitutional limitation, a court cannot cure such invalidity merely by striking such limiting language, where the elimination of such limiting language would substantially extend the operation of the legislative enactment beyond the scope contemplated by all the language of such legislative enactment."

On May 20, 1957, the Ohio Supreme Court journalized and made a part of the judgment and holding, its certificate specifying the grounds upon which its decision was based (see Appendix VI), *Charleston Federal Savings and Loan Association v. Alderson*, 324 U. S. 182, 186 n. 1, 89 L. Ed. 857, 65 S. Ct. 624; *International Steel & Iron Company v. National Surity Co.*, 297 U. S. 657, 662, 80 L. Ed. 961, 56 S. Ct. 619; and compare the Ohio Supreme Court's decision in this case with that of the Mississippi Supreme Court in *Lawrence v. State Tax Commissioner*, 286 U. S. 276, 76 L. Ed. 1102, 52 S. Ct. 556.

VI

THE FEDERAL QUESTION IS SUBSTANTIAL

Exeepting for a discussion of points peculiar to this appeal, appellant adopts here what has been said concerning the equal protection question in the jurisdictional statement submitted in *Youngstown Sheet and Tube Company v. Bowers.*

As noted in that statement, the Ohio Supreme Court construed the phrase "for storage only" as being applicable "where nothing is done in connection with such storage except what is necessary for the preservation of the stored merchandise or agricultural products," *General Cigar Co., Inc., v. Peck*, 159 Ohio St., 152, 111 N. E. (2d) 265.

In *The B. F. Goodrich Co. v. Peck*, 161 Ohio St. 202, 118 N. E. (2d) 525, the second paragraph of the court's syllabus held:

> "2. Property may be held 'for storage only, even though its owner intends at some subsequent time to sell it or to use it as manufacturing material. (*General Cigar Co., Inc. v. Peck, Tax Commr.*, 159 Ohio St., 152 followed.)"

Like the B. F. Goodrich Company, appellant operates retail merchandise outlets in various Ohio cities. And also like Goodrich, it stores merchandise in central warehouses from which the stores are supplied. In both cases, the merchandise is in finished form. The facts of this case are indistinguishable from those of *Goodrich*, but for one element: the residence of the taxpayer. Goodrich is a foreign corporation, whereas the appellant is a domestic. Hence, Goodrich was excepted from tax on its merchandise, while appellant has been required to pay the tax.

The two companies operate the same type of business, are in competition for the same general market, and store the same types of merchandise for the same purpose. No distinction can be drawn between the businesses or the business merchandise held in storage. The single distinction upon which the tax has been predicated is the taxpayers' residence, and that distinction operates not only against appellant but against all Ohio residents doing business in competition with nonresidents.

Finally, this appeal raises the question whether a state legislature has broader powers of classification where its own residents are concerned, than where nonresidents are. In sum, may a state subject its own residents to a greater degree discrimination than might ordinarily be permitted against nonresidents?

For the above reasons and those discussed in the jurisdictional statement filed in Youngstown Sheet and Tube Company v. Bowers, the appellant here concludes that the equal protection question is substantial, and particularly so in view of the Board of Tax Appeals holding that the appellant's merchandise was for storage only, and the Ohio Supreme Court's assumption that even though the statute be unconstitutional, it must nevertheless be sustained.

VII

CONCLUSION

Appellant concludes that this court has jurisdiction of the appeal; that the constitutional question was timely raised; that the Ohio Supreme Court allowed the appeal on the constitutional question and passed upon the question; and that the question involved is substantial.

Alternatively, should the court determine that it does not have jurisdiction, certiorari should be granted.

Respectfully submitted,

CARLTON S. DARGUSCH, SR.,
Attorney for Appellant.

APPENDIX I

Order of Tax Commissioner

(Dated March 2, 1955.)

This proceeding being the application of Allied Stores of Ohio, Inc., an inter-county corporation, Cleveland, Ohio, for review and redetermination of an increased tangible personal property tax assessment for the year 1954, after being duly heard, came on to be considered.

The applicant herein, a domestic corporation, in making its inter-county return of taxable property for the year 1954, eliminated from the average value of its merchandise inventories reported therein an amount representing the value of merchandise held by it in storage warehouses for storage only. In support of the value so eliminated, the applicant submitted with its return a separate schedule setting forth the monthly values of such stored property. The applicant also filed a claim for deduction from the book value of its furniture, fixtures, and equipment taxable in Schedule 4.

In passing upon the applicant's claim for deduction from the book value of its furniture, fixtures, and equipment, which claim was allowed in full, the separate schedule submitted by the applicant, with respect to merchandise in storage, was construed as a claim for deduction and the average monthly value reflected in such schedule was deducted from the average value of taxable merchandise inventories as reported by the applicant. This action resulted in a duplicate reduction for such property inasmuch as the applicant itself had eliminated the value of merchandise in storage from the average value of taxable inventories listed in Schedule 3A. Subsequently, the average value of merchandise held in storage for storage only was

added back to the taxable value listed in Schedule 3A and an amended preliminary assessment certificate issued reflecting such action. The applicant filed this application for review and redetermination therefrom, contending that the statutes purported to levy a tax on merchandise and agricultural products of residents of this state held in storage warehouses for storage only were unconstitutional and void, in that, identical property of a nonresident is excepted from taxation under the provisions of Section 5701.08, Revised Code, as construed in the case of The B. F. Goodrich Co. v. Peck, 161 Ohio St., 202.

Being fully advised in the premises, the Tax Commissioner finds that as an administrative official he is without authority to pass on the question of the constitutionality of the statutes here involved, such being the province of the courts alone. Cincinnati, W. & Z. R. Co. v. Clinton County, 1 Ohio St., 77; State ex rel. Davis v. Hildebrant, 94 Ohio St., 154, 114 N. E., 55. Furthermore, the Tax Commissioner finds that as an administrative official, he must proceed in accordance with the terms and provisions of the statutes with which he is concerned with the assumption of their constitutionality. East Ohio Gas Co. v. Public Utilities Comm., 137 Ohio St., 225, 28 N. E. 2d, 599; Argo v. Kaiser, 66 O. L. Abs., 538, 118 N. E. 2d, 162. Thus, the Tax Commissioner finds no error in the assessment as made insofar as it purports to assess merchandise and agricultural products of the applicant held in storage warehouses for storage only since such property is subject to taxation under the provisions of Sections 5701.08, 5709.01, 5711.22 and correlated sections of the Revised Code. However, the Tax Commissioner finds that because of the duplicate reduction in applicant's taxable inventories hereinbefore explained, that the true average value of merchandise in

storage has not as yet been assessed. Taking such fact into account and making proper allowance in applicant's taxable inventories as provided in Rule No. 222 of the Department of Taxation, the Tax Commissioner finds the true average value of applicant's inventories to be $6,784,927.00 for the year 1954.

The Tax Commissioner, being further advised, finds that the applicant's claim for deduction from the book value of its furniture, fixtures, and equipment was not well taken and that such claim should be, and the same hereby is, denied in its entirety. The Tax Commissioner also finds that applicant's net taxable credits and money and other taxable intangibles as listed were deficient as disclosed upon audit and that corrections therein are in order.

Giving effect to the findings made herein with respect to property of the applicant taxable in Schedules 4, 9, and 10, the Tax Commissioner finds that the true value of property taxable in such schedules for the year 1954 is as follows:

Schedule	True Value
4	$2,645,009.00
9	1,935,390.00
10	592,400.00

It is, therefore, the order of the Tax Commissioner that a corrected assessment certificate be issued in accordance with the findings made in this journal entry. Such certificate shall be final with respect to the assessment of all taxable property listed in the applicant's return.

APPENDIX II

Entry of the Board of Tax Appeals

(Dated August 18, 1955.)

This appeal is from a final order of the Tax Commissioner made on March 2, 1955. In and by this order, issued upon an application for review and redetermination, the commissioner made an increased personal property tax assessment against the taxpayer for the year 1954.

The cause now comes on for further and final consideration upon the commissioner's transcript, appellant's notice of appeal, the record of a hearing had before this board on June 1, 1955, a stipulation of facts, certain exhibits and briefs of counsel.

Appellant's counsel, in the course of his opening statement, succinctly states the taxpayer's complaint, and the question that is now before this board. He says:

> "In the notice of appeal we raise two questions, one of which we do not desire to present, as we wish to present but a single question to the Board in the Allied Stores case. The matter upon which we will go forward is that which involves the taxability of the storage merchandise held by taxpayer, a domestic corporation, in storage warehouses for storage only within the meaning of the statute.
>
> "It is our contention that the statutes of Ohio which purport to levy a tax on the storage inventory of this taxpayer discriminates against it and deny taxpayer the equal protection of the laws under both the state and Federal constitutions in that property of the same kind when held by a non resident is excepted from taxation under the so-called Goodrich case. (Goodrich Company v. Peck, 161 O. S. 202).

"We have raised a question also, as I indicated, of the value of furniture and fixtures which is a question of fact which we do not intend to go forward with, and we will present only the legal question that is involved in the storage merchandise.

"I think there are two problems there. One, whether the merchandise in question is held in the storage warehouse for storage only within the meaning of the statute; and, secondly, whether the statutes which purport to levy a tax on that property are unconstitutional in that they deny taxpayer the equal protection of the laws."

It, therefore, appears that appellant abandons all other compiaints, save the two questions noted.

The only real point of difference between the present case and that of the Goodrich case, supra, lies in that appellant is a domestic, or an Ohio corporation, engaged exclusively in merchandising, while The Goodrich Company is a nonresident manufacturing corporation. After again re-examining the decisions of the court in General Cigar Co., Inc., v. Peck, 159 O. S., 152, and Goodrich Co. v. Peck, supra, the Board of Tax Appeals is of the opinion that appellant's first problem must be answered in the affirmative.

Since appellant's principal query concerns a matter of discrimination and the constitutionality of Revised Code Section 5701.08 (General Code Section 5325-1), matters over which this board is without jurisdiction to consider, this board can do nothing else but to affirm the Tax Commissioner's order as made, which is hereby accordingly done.

APPENDIX III

Entry of the Court of Appeals of Cuyahoga County, Ohio.

Judgment affirmed. The property, under the agreed facts, was "kept on hand—as merchandise" and "held as means—for carrying on the business" of the appellant and was thus "used in business" in the state of Ohio (Sec. 5701.08 R. C.) and consequently came within the purview of Section 5709.01 R. C. and was taxable as "personal property located and used in business in that state." The positive statement in Section 5701.08 R. C. that "products belonging to a nonresident of this state is not used in business in this state if held in storage warehouses for storage only" is not an arbitrary or artificial classification and is within the right and power of the legislature to declare. See City of Xenia v. Schmidt, 101 O. S. 437; Travellers' Ins. Co. v. Connecticut, 185 U. S. 364. Goodrich Co. v. Peck, 161 O. S. 202, in effect so holds. We decide, therefore, that the decision of the Board of Tax Appeals was neither unreasonable nor unlawful. Exceptions. Order see journal.

APPENDIX IV

Opinion of the Supreme Court of Ohio

ALLIED STORES OF OHIO, INC., APPELLANT, *v.* BOWERS, TAX COMMR., APPELLEE.

Although a legislative enactment may be invalid merely because certain limiting language therein makes it repugnant to constitutional limitations, a court cannot cure such invalidity merely by striking such limiting language, where the elimination of such limiting language would substantially extend the operation of the legislative enactment beyond the scope contemplated by all the language of such legislative enactment.

(No. 34926—Decided January 30, 1957.)

Appeal from the Court of Appeals for Cuyahoga County.

Allied Store of Ohio, Inc., herein referred to as the taxpayer, is an Ohio corporation. In an appeal to the Board of Tax Appeals from a final order of the Tax Commissioner, the taxpayer contended that the Tax Commissioner had erroneously assessed for taxation for the year 1954 certain "merchandise * * * held in a storage warehouse for storage only" within the meaning of those words as used in Section 5701.08, Revised Code, in effect prior to September 30, 1955, and that the statutes of Ohio were unconstitutional to the extent that they purported to levy a tax on such property not "belonging to a nonresident of" Ohio, in that they denied a resident such as the taxpayer the protection of the laws equal to that enjoyed by a nonresident. See *Little v. Smith, Atty. Genl.*, 124 Kan., 237, 257 P., 959, 57 A. L. R., 100; *Colgate v. Harvey*, 297 U. S., 404.

Section 5709.01, Revised Code, reads so far as pertinent:

"* * * All personal property located and used in business in this state * * * are subject to taxation, regardless of the residence of the owners thereof."

Section 5701.08, Revised Code, prior to September 30, 1955, read so far as pertinent:

"(A) Personal property is 'used' within the meaning of 'used in business' * * * when acquired or held as means or instruments for carrying on the business * * * or when stored or kept on hand as material, parts, products, or merchandise; but merchandise or agricultural products belonging to a nonresident of this state is [are] not used in business in this state if held in a storage warehouse for storage only."

In its final entry, the Board of Tax Appeals stated in part:

"The only real point of difference between the present case and that of the *Goodrich case*, * * * [161 Ohio St., 202, 118 N. E. (2d), 525] lies in that appellant is a domestic, or an Ohio corporation, engaged exclusively in merchandising, while the Goodrich company is a nonresident manufacturing corporation. * * *

"Since appellant's principal query concerns a matter of discrimination and the constitutionality of Revised Code Section 5701.08 * * *, matters over which this board is without jurisdiction to consider, this board can do nothing else but to affirm the Tax Commissioner's order as made * * *."

In affirming the decision of the Board of Tax Appeals, the Court of Appeals stated in part:

"The positive statement in Section 5701.08, Revised Code, that 'products belonging to a nonresident of this state is not used in business in this state if held in

a storage warehouse for storage only, is not an arbitrary or artificial classification and is within the right and power of the Legislature to declare. See *City of Xenia v. Schmidt*, 101 Ohio St., 437 [130 N. E., 24]; *Travelers' Ins. Co. v. Connecticut*, 185 U. S., 364. *Goodrich Co. v. Peck*, 161 Ohio St., 202 [118 N. E. (2d), 525], in effect so holds."

The cause is now before this court on appeal from the judgment of the Court of Appeals as a case involving a debatable constitutional question and pursuant to allowance of a motion to certify the record.

Mr. Carlton S. Dargusch, Sr., and *Mr. Jack H. Bertsch*, for appellant.

Mr. C. William O'Neill, attorney general, *Mr. Larry Snyder* and *Mr. Kiehner Johnson*, for appellee.

TAFT, J. Ordinarily, a constitutional question will not be considered unless it is necessary to consider such constitutional question in deciding the case before the court. In our opinion, it is not necessary to consider the constitutional question raised by the taxpayer in the instant case because, if its contention with regard to that question is sound, it necessarily leads to the conclusion that the entire proviso in subdivision (A) of Section 5701.08, which read, "but merchandise or agricultural products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only," was void and should be stricken. That being so, it is apparent that any of taxpayer's "merchandise • • • held in a storage warehouse for storage only" would be taxable because described by the preceding words remaining in the statute and reading, "stored • • • as • • • merchandise."

Of course, if only that portion of the proviso after the semicolon in subdivision (A) of Section 5701.08, which read, "belonging to a nonresident of this state," is stricken, the discrimination between residents and nonresidents would be eliminated; and then the proviso would prevent taxation of the taxpayer's "merchandise • • • held in a storage warehouse for storage only." However, the question remains as to the power of this court to effect that result by striking only that portion of the proviso. In other words, if we assume that the taxpayer's contention that the discrimination beween nonresidents and residents contemplated by the words of the proviso would deny a resident the equal protection of the laws and must be eliminated, has this court the power to eliminate that discrimination by striking only that portion of the proviso reading, "belonging to a nonresident of this state"? If it does not have that power, the whole proviso must be stricken in order to eliminate that discrimination and then the taxpayer would obviously have nothing upon which to base its claim for the relief which it seeks.

Although a legislative enactment may be invalid merely because certain limiting language therein makes it repugnant to constitutional limitations, a court cannot cure such invalidity merely by striking such limiting language, if the elimination of such limiting language would substantially extend the operation of the legislative enactment beyond the scope contemplated by all the language of such legislative enactment.

In the opinion by Welch, J., in *State, ex rel. McNeal, v. Dombaugh, Clerk*, 20 Ohio St., 167, 174, it is said:

"It is by a mere figure of speech that we say an unconstitutional provision of a statute is 'stricken out.' For all the purposes of construction it is to be regarded as part

of the act. The *meaning* of the Legislature must be gathered from all they have said, as well from that which is ineffective for want of power, as from that which is authorized by law."

In *State, ex rel. Wilmot, v. Buckley,* 60 Ohio St., 273, 296, 54 N. E., 272, it is said in the opinion by Burket, J.:

"* * * the court has no lawmaking power, and cannot extend a statute over territory from which it is excluded by the General Assembly. A court can hold a whole act unconstitutional because it is not broad enough * * *; but it cannot extend an act which is too narrow, so as to take in territory which was left out by the General Assembly."

In 11 American Jurisprudence, 855, Section 161, it is said:

"One important class of cases in which questions as to the severability of valid and invalid portions of an act and the determination of the legislative intent are involved consists of statutes containing invalid exceptions or provisos. The general rule is that if such a proviso operates to limit the scope of the act in such a manner that by striking out the proviso, the remainder of the statute would have a broader scope either as to subject or territory, then the whole act is invalid, because such extended operation would not be in accordance with the legislative intent."

See also *Connolly v. Union Sewer Pipe Co.,* 184 U. S., 540, 46 L. Ed., 679, 22 S. Ct., 431; *State, ex rel. Wilson, Solr., v. Lewis, Aud.,* 74 Ohio St., 403, 78 N. E., 523; *State, ex rel. Squire, Supt. of Banks, v. City of Cleveland,* 150 Ohio St., 303, 336, 82 N. E. (2d), 709; *State, ex rel. English, v. Industrial Commission,* 160 Ohio St., 215, 217 *et seq.,* 115 N. E. (2d), 395; but see *State, ex rel., v. Baker,* 55 Ohio St., 1, 44 N. E., 516.

In the instant case, we do not have a legislative situation where the proviso was merely enacted as a part of a statute defining the objects to be subject to taxation. In such an instance, striking the words "belonging to a nonresident of this state" would merely prevent the tax from being extended as far as the General Assembly intended. By doing that, this court would not be extending the operation of the statute so as to cover subjects or objects that the General Assembly did not intend to cover.

However, in the instant case, these taxing statutes, as originally enacted in 1931 (114 Ohio Laws, 714), did not contain the proviso which the taxpayer must necessarily rely upon for any relief *after* it has had this court remove from it the portion which it contends was invalid. The proviso was added by an amendment to the statute in 1933 (115 Ohio Laws, 548). See annotation, 66 A. L. R., 1483. Cf. *Frost v. Corporation Commission of Oklahoma*, 278 U. S., 515, 525, 73 L. Ed., 483, 49 S. Ct., 235; *Reitz v. Mealey, Commr.*, 314 U. S. 33, 38, 39, 86 L. Ed., 21, 62 S. Ct., 24; 11 American Jurisprudence, 841, 856, 857, Sections 154, 161. Prior to that amendment, the General Assembly had expressed an intention to tax any property "when stored or kept on hand as * * * merchandise." The amendment dealt with a withdrawal of some of that property from such taxation. The General Assembly provided only for withdrawal of "merchandise or agricultural products belonging to a nonresident." It did not provide for anything with respect to such merchandise or agricultural products belonging to a resident. If this court merely strikes the words "belonging to a nonresident of this state," the effect of that would be to provide for such a withdrawal of "merchandise or agricultural products" belonging to a resident; and it would thereby be substan-

tially *extending* the operation of the legislative enactment beyond the scope contemplated by the legislative language. As the taxpayer recognizes in its reply brief, its contention is that "the *failure* of the Legislature *to extend* the exception to residents is" what was unconstitutional. By merely striking the words "belonging to a nonresident of this state," this court in effect would be exercising a legislative power which it does not have.

Therefore, if we assume that the proviso was unconstitutional and invalid because it denied to residents a protection of the laws equal to that enjoyed by nonresidents, it would be necessary to strike the whole proviso to eliminate that invalidity. If that is done, the taxpayer would not be entitled to any relief. It follows that the judgment of the Court of Appeals must be affirmed.

Judgment affirmed.

Stewart, Bell, Matthias and Herbert, JJ., concur.

Weygandt, C. J., and Zimmerman, J., concur in the judgment.

APPENDIX V

Stipulation of Facts

[Filed June 1, 1955.]

It is stipulated and agreed by and between counsel for the respective parties hereto that the following may be considered and accepted as the facts for all purposes pertinent to the consideration and decision of the above case:

1. Allied Stores of Ohio, Inc., appellant herein, is a corporation organized and existing under and by virtue of the laws of the state of Ohio with its principal office at Euclid and 13th street, Cleveland, Ohio.

2. Appellant operates retail department stores and maintains warehouses in the cities of Akron, known as The A.

Polsky Company; Cincinnati, known as The Rollman and Sons Co.; Cleveland, known as The Sterling Lindner Davis Company; and Columbus, known as Morehouse-Fashion Co. See Exhibits A, B, C, and D, attached hereto and made a part hereof.

3. The tax year in question is 1954, and the property covered thereby was listed as of January 31, 1954, except inventory, including inventory stored in storage warehouses, which was averaged for the twelve months covered by the fiscal year, February 1, 1953, to January 31, 1954, and such inventory including inventory stored in storage warehouses was assessed by appellee as taxable.

4. The warehouses in which inventory was stored by appellant were as follows:

(1) The A. Polsky Company warehouse in Akron is a private warehouse leased, operated and controlled by appellant. Exhibit A supra.

(2) The Rollman and Sons Co. warehouses in Cincinnati are private warehouses leased, operated and controlled by appellant. Exhibit B supra.

(3) The Sterling Lindner Davis warehouse in Cleveland is a private warehouse owned, operated and controlled by appellant. Exhibit C supra.

(4) The Morehouse-Fashion Co. warehouse in Columbus is a private warehouse leased, operated and controlled by appellant. Exhibit D supra.

5. The dollar value of the inventory carried in each of the foregoing warehouses is set forth in Exhibit E, attached hereto and made a part hereof, and is shown for the fiscal year beginning February 1, 1953 and ending January 31, 1954. All of said property was owned by the appellant.

6. The dollar value of the inventory carried in The A. Polsky Company warehouse in Akron was divided into two major groups as follows:

County: Summit
Taxing District: Akron

		Group 1	Group 2
January, 1954	$ 387,115	349,178	37,937
February, 1953	378,417	341,332	37,085
March, 1953	389,929	351,716	38,213
April, 1953	417,284	376,390	40,894
May, 1953	494,263	445,825	48,438
June, 1953	367,460	331,449	36,011
July, 1953	243,136	219,309	23,827
August, 1953	239,966	216,449	23,517
September, 1953	239,988	216,469	23,519
October, 1953	187,533	169,155	18,378
November, 1953	267,046	240,876	26,170
December, 1953	198,826	179,341	19,485
Total Monthly Inventory	3,810,963	3,437,489	373,474
Average Monthly Inventory Value	317,580	286,457	31,123

7. The dollar value of the inventory carried in The Rollman and Sons Co. warehouse in Cincinnati consisted entirely of group 1 type merchandise, as follows:

County: Hamilton
Taxing District: Cincinnati

		Group 1
January, 1954	$ 275,830	275,830
February, 1953	283,380	283,380
March, 1953	283,390	283,390
April, 1953	263,898	263,898
May, 1953	236,180	236,180
June, 1953	186,090	186,090
July, 1953	254,580	254,580
August, 1953	297,130	297,130
September, 1953	326,630	326,630
October, 1953	333,410	333,410
November, 1953	314,900	314,900
December, 1953	265,950	265,950
Total Monthly Inventory	3,321,368	3,321,368
Average Monthly Inventory Value	276,780	276,780

Note: Items representing group 2 were warehoused within the retail store.

8. The dollar value of the inventory carried in The Sterling Lindner Davis Company warehouse in Cleveland was divided into two major groups, as follows:

County: Cuyahoga
Taxing District: Cleveland

		Group 1	Group 2
January, 1954	$ 320,668	286,228	34,440
February, 1953	364,299	325,173	39,126
March, 1953	397,766	355,046	42,720
April, 1953	397,590	354,889	42,701
May, 1953	411,818	367,589	44,229
June, 1953	393,720	351,434	42,286
July, 1953	381,860	340,848	41,012
August, 1953	351,424	313,681	37,743
September, 1953	355,689	317,488	38,201
October, 1953	430,625	384,376	46,249
November, 1953	419,682	374,608	45,074
December, 1953	356,778	318,460	38,318
Total Monthly Inventory	4,581,919	4,089,820	492,099
Average Monthly Inventory Value	381,826	340,818	41,008

9. The dollar value of the inventory carried in the Morehouse-Fashion Co. warehouse in Columbus was divided into two major groups, as follows:

County: Franklin
Taxing District: Columbus

		Group 1	Group 2
January, 1954	$ 150,453	127,885	22,568
February, 1953	170,263	144,724	25,539
March, 1953	168,855	143,527	25,328
April, 1953	185,847	148,678	37,169
May, 1953	187,934	150,347	37,586
June, 1953	168,370	134,696	33,674
July, 1953	171,660	145,911	25,749
August, 1953	179,229	152,345	26,884

		Group 1	Group 2
September, 1953	187,929	159,740	28,189
October, 1953	203,896	163,117	40,779
November, 1953	189,647	113,788	75,859
December, 1953	159,065	103,386	55,679
Total Monthly Inventory	2,123,148	1,688,144	435,004
Total Monthly Inventory Value	176,929	140,679	36,250

10. Group 1 in the A. Polsky, Rollman, Sterling Lindner Davis, and Morehouse-Fashion warehouses was composed of the following items:

Infants furniture, kitchen furniture, bulk housewares (such as unpainted furniture, step ladders, etc.), stoves, refrigerators, sinks, cabinets, dishwashers, washing machines and dryers, mattresses, television, radios, record players, floor coverings (such as linoleum, carpets and rugs), prepackaged sets of dinnerware, bulk toys, such as bicycles, gym sets, etc.; living room furniture, dining and bedroom furniture and miscellaneous casual furniture.

The items covered by Group 1 are those which normally would be sold to customers in the retail store from floor samples maintained therein and with respect to which sales deliveries were normally made to the customer from warehouse stocks.

11. Group 2 in the A. Polsky, Sterling Lindner Davis, and Morehouse-Fashion warehouses was composed of the following items:

Luggage, sporting goods (such as golf equipment, fishing equipment, etc.), pillows and blankets, miscellaneous wrought iron novelties such as are normally sold in the stationery department of a department store; paints, some miscellaneous sizes of small rugs, sanitary goods, toilet paper and soaps and venetian blinds.

The items covered by Group 2 are those which normally would be sold to customers in the retail store and delivered to the customer from stocks of merchandise maintained in the retail store and transferred from the warehouse to the retail store for that purpose.

12. All the items of merchandise stored in the several warehouses of appellant were finished products in condition for sale to the ultimate consumer. The items stored, being held (a) for ultimate distribution to the retail department stores of appellant (Group 2), or (b) ultimate delivery to customer as the result of sales made to customers at the retail stores of appellant (Group 1). No sales were made to customers as the result of sales made to customers at the dise. None of the items stored in the said warehouses were manufactured by appellant, but all were purchased from suppliers located both within and without Ohio.

13. The foregoing constitutes all of the facts to be offered by either of the parties hereto in these proceedings.

C. William O'Neill,
Attorney General, State of Ohio,
Larry H. Snyder,
Assistant Attorney General, State of Ohio,
Attorneys for the Tax Commissioner, State of Ohio.
Carlton S. Dargusch, Sr.,
Attorney for Allied Stores of Ohio, Inc.

APPENDIX VI

SUPREME COURT OF OHIO

ALLIED STORES OF OHIO, INC., APPELLANT, VS. STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO, APPELLEE.

Certificate

On motion of the appellant, Allied Stores of Ohio, Inc., it is ordered to be certified and made a part of the record

of the proceedings and of the judgment of the court in this cause that by its appeal from the Court of Appeals of Cuyahoga county, the appellant placed in issue the constitutionality of formed Section 5701.08, Revised Code of Ohio, contending that the said section as enacted and as construed and applied denied appellant (a resident corporation) equal protection of the laws in violation of Section 1of the Fourteenth Amendment of the United States Constitution for the reason that it taxed storages only of resident corporations while excepting the same property of nonresident corporations, and that the court found, pursuant to appeal, briefs and oral argument of counsel, that despite such alleged discrimination it was without jurisdiction to provide relief; that to do so would result in amending the section to include appellant within the exception; that therefore the section must stand; that so standing and so construed the section was not repugnant to the United States Constitution or if repugnant, has nevertheless to be sustained in accordance with the intent of the General Assembly, even though discriminatory; and that this holding was appropriate and necessary to the court's decision.

Witness the Honorable Supreme Court of Ohio, this 20 day of May, 1957.

Supreme Court of Ohio
Carl V. Weygandt
Chief Justice of the Supreme Court of Ohio.

No. 5[illegible].10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

ALLIED STORES OF OHIO, INC.,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

BRIEF OPPOSING MOTION TO DISMISS

CARLTON S. DARGUSCH,
33 North High St., Columbus 15, Ohio,
Attorney for Appellant.

WILLIAM SAXBE,
Attorney General,
JOHN M. TOBIN,
Assistant Attorney General,
State House, Columbus 15, Ohio,
Attorneys for Appellee.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 589

ALLIED STORES OF OHIO, INC.,

Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

BRIEF OPPOSING MOTION TO DISMISS

Appellant desires first to clarify a point possibly not made apparent in its jurisdictional statement. Under the Ohio Supreme Court's holding in *The B. F. Goodrich Co. v. Peck*, 161 Ohio St., 202, 118 N. E. 2d, 525, foreign corporations are "nonresidents". We quote from the court's syllabus:

> "1. In the absence of the expression of a contrary legislative intention, a corporation incorporated under the laws of a foreign state will generally be included by the use in a statute of the word 'nonresident'."

Turning to the Tax Commissioner's motion to dismiss, he contends that the discrimination appearing in Section 5701.08, Revised Code of Ohio, is reasonable because, as he puts it on page 4 of his motion:

> "No doubt the basis for this legislative pronouncement was the conviction that property which was not

used in business in the state in any real sense should not be taxed, and the knowledge that such property of a nonresident was ordinarily neither a product of this state nor was it destined to be committed to the commerce of this state."

Appellant does not concede the validity of a statutory presumption that corporations do not ordinarily sell or manufacture products outside the state of their incorporation, and the Ohio Supreme Court did not uphold the statute on that ground. Just the contrary, it held that even though the statute be unconstitutional and in violation of equal protection, it must nevertheless be sustained. Consequently, residents continue to be taxed on storages and nonresidents continue to be excepted from taxation irrespective of the statute's constitutionality.

The commissioner also contends that the decision was based upon an adequate non-federal ground. The effect of the decision was to deny appellant's claim of unequal protection by holding that if the statute were unconstitutional; residents would still be liable for the tax, and at any rate, they could not be relieved of the tax, even if discriminated against, because that would run counter to the legislature's intent. As pointed out in appellant's jurisdictional statement, this is no decision at all, *Lawrence v. State Tax Commissioner,* 286 U. S., 276, 76 L. Ed., 1102, 52 S. Ct., 556.

Nor is there any question of separation of powers. If a statute is unconstitutional, the courts have jurisdiction so to hold.

Respectfully submitted,

CARLTON S. DARGUSCH,
33 North High St., Columbus 15, Ohio,
Attorney for Appellant.

No. 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

On Appeal from the Supreme Court of Ohio

ALLIED STORES OF OHIO, INC.,
Appellant.

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

BRIEF FOR APPELLANT.

CARLTON S. DARGUSCH,
CARLTON S. DARGUSCH, JR.,
JACK H. BERTSCH,
Attorneys for Appellant.

WILLIAM SAXBE,
Attorney General,
JOHN M. TOBIN
Assistant Attorney General,
Attorneys for Appellee.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

INDEX

Cases Cited

Statute Cited

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 10,

ALLIED STORES OF OHIO, INC.,

Appellant.

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

BRIEF FOR APPELLANT.

OPINIONS BELOW

The opinion of the Court of Appeals, Cuyahoga County, Ohio, is unreported, see R. 14. The opinion of the Supreme Court of Ohio (R. 15-21) is reported in *Allied Stores of Ohio, Inc., vs. Bowers*, 166 Ohio St. 116; 140 N.E. 2d 411.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered January 30, 1957 (R. 1). On February 13, 1957, the appellant filed application for rehearing (R. 21), and on February 20, 1957, order was entered denying rehearing (R. 1). Notice of appeal to this Court was then filed with Supreme Court of Ohio on April 30, 1957 (R. 2). On June 25, 1957, appellant was granted an extension of time for filing

the record and jurisdictional statement until August 3
1957. On July 29, 1957, appellant was granted a furthe
extension until September 30, 1957. And on October 1
1957, a final extension was granted until October 31, 195
(R. 24). The record and jurisdictional statement were
filed on October 30, 1957. The jurisdiction of the Cour
rests on 28 U. S. C., 1257 (2).

QUESTION

Does a state statute which imposes an *ad valorem* prop
erty tax on personal property held by a resident fo
storage only and which excepts from tax the same propert
held by non-residents, deny residents the equal protectio
of the laws in violation of Section 1 of the Fourteent
Amendment to the Constitution of the United States?

STATUTE INVOLVED

The state statute involved is former Section 5701.08, Re
vised Code, which read as follows:

"As used in Title LVII of the Revised Code:

"(A) Personal property is 'used' within the mean
ing of 'used in business' when employed or utilized i
connection with ordinary or special operations, whe
acquired or held as means or instruments for carry
ing on the business, when kept and maintained as
part of a plant capable of operation, whether actuall
in operation or not, or when stored or kept on han
as material, parts, products, or merchandise; but mer
chandise, or agricultural products belonging to a non
resident of this state is not used in business in thi
state if held in a storage warehouse for storage only
Moneys, deposits, investments, accounts receivable
and prepaid items, and other taxable intangibles ar
'used' when they or the avails thereof are being applie
or are intended to be applied, in the conduct of th
business, whether in this state or elsewhere.

"(B) 'Business' includes all enterprises conducte
for gain, profit, or income and extends to persona
service occupations."

STATEMENT

The facts of this case have been stipulated as follows:

"It is stipulated and agreed by and between counsel for the respective parties hereto that the following may be considered and accepted as the facts for all purposes pertinent to the consideration and decision of the above case:

"1. Allied Stores of Ohio, Inc., appellant herein, is a corporation organized and existing under and by virtue of the laws of the state of Ohio with its principal office at Euclid and 13th Street, Cleveland, Ohio.

"2. Appellant operates retail department stores and maintains warehouses in the cities of Akron, known as The Rollman and Sons Co.; Cleveland, known as The Sterling Lindner Davis Company; and Columbus, known as Morehouse-Fashion Co. See Exhibits A, B, C, and D, attached hereto and made a part hereof.

"3. The tax year in question is 1954, and the property covered thereby was listed as of January 31, 1954, except inventory, including inventory stored in storage warehouses, which was averaged for the twelve months covered by the fiscal year, February 1, 1953, to January 31, 1954, and such inventory including inventory stored in storage warehouses was assessed by appellee as taxable.

"4. The warehouses in which inventory was stored by appellant were as follows:

(1) The A. Polsky Company warehouse in Akron is a private warehouse leased, operated and controlled by appellant. Exhibit A supra.

(2) The Rollman and Sons Co. warehouses in Cincinnati are private warehouses leased, operated and controlled by appellant. Exhibit B supra.

(3) The Sterling Lindner Davis warehouse in Cleveland is a private warehouse owned, operated and controlled by appellant. Exhibit C supra.

(4) The Morehouse-Fashion Co. warehouse in Columbus is a private warehouse leased, operated and controlled by appellant. Exhibit D supra.

"5. The dollar value of the inventory carried in each of the foregoing warehouses is set forth in Exhibit E, attached hereto and made a part hereof, and is shown for the fiscal year beginning February 1, 1953 and ending January 31, 1954. All of said property was owned by the appellant.

"6. The dollar value of the inventory carried in The A. Polsky Company warehouse in Akron was divided into two major groups as follows:

County: Summit Taxing District: Akron		Group 1	Group 2
January, 1954	$387,115	349,178	37,937
February, 1953	378,417	341,332	37,085
March, 1953	389,929	351,716	38,213
April, 1953	417,284	376,390	40,894
May, 1953	494,263	445,825	48,438
June, 1953	367,460	331,449	36,011
July, 1953	243,136	219,309	23,827
August, 1953	239,966	216,449	23,517
September, 1953	239,988	216,469	23,519
October, 1953	187,533	169,155	18,378
November, 1953	267,046	240,876	26,170
December, 1953	198,826	179,341	19,485
Total Monthly Inventory	$3,810,963	3,437,489	373,474
Average Monthly Inventory Value	317,580	286,457	31,123

"7. The dollar value of the inventory carried in The Rollman and Sons Co. warehouse in Cincinnati consisted entirely of group 1 type merchandise, as follows:

"County: Hamilton
Taxing District: Cincinnati

		Group 1
January, 1954	$275,830	275,830
February, 1953	283,380	283,380
March, 1953	283,390	283,390
April, 1953	263,898	263,898
May, 1953	236,180	236,180
June, 1953	186,090	186,090
July, 1953	254,580	254,580
August, 1953	297,130	297,130
September, 1953	326,630	226,630
October, 1953	333,410	333,410
November, 1953	314,900	314,900
December, 1953	265,950	265,950
Total Monthly Inventory	$3,321,368	3,321,368
Average Monthly Inventory Value	276,780	276,780

"Note: Items representing group 2 were warehoused within the retail store.

"8. The dollar value of the inventory carried in The Sterling Lindner Davis Company warehouse in Cleveland was divided into two major groups, as follows:

"County: Cuyahoga
Taxing District: Cleveland

		Group 1	Group 2
January, 1954	$320,668	286,228	34,440
February, 1953	364,299	325,173	39,126
March, 1953	397,766	355,046	42,720
April, 1953	397,590	354,889	42,701
May, 1953	411,818	367,589	44,229
June, 1953	393,720	351,434	42,286
July, 1953	381,860	340,848	41,012
August, 1953	351,424	313,681	37,743

September, 1953	355,689	317,488	38,201
October, 1953	430,625	384,376	46,249
November, 1953	419,682	374,608	45,074
December, 1953	356,778	318,460	38,318
Total Monthly Inventory	$4,581,919	4,089,820	492,099
Average Monthly Inventory Value	381,826	340,818	41,008

"9. The dollar value of the inventory carried in the Morehouse-Fashion Co. warehouse in Columbus was divided into two major groups, as follows:

County: Franklin
Taxing District: Columbus

		Group 1	Group 2
January, 1954	$150,453	127,885	22,568
February, 1953	170,263	144,724	25,539
March, 1953	168,855	143,527	25,328
April, 1953	185,847	148,678	37,169
May, 1953	187,934	150,347	37,586
June, 1953	168,370	134,696	33,674
July, 1953	171,660	145,911	25,749
August, 1953	179,229	152,345	26,884
September, 1953	187,929	159,740	28,189
October, 1953	203,896	163,117	40,779
November, 1953	189,647	113,788	75,859
December, 1953	159,065	103,386	55,679
Total Monthly Inventory	$2,123,148	1,688,144	435,004
Average Monthly Inventory Value	176,929	140,679	36,250

"10. Group 1 in the A. Polsky, Rollman, Sterling Lindner Davis, and Morehouse-Fashion warehouses was composed of the following items:

"Infants furniture, kitchen furniture, bulk housewares (such as unpainted furniture, step ladders, etc.), stoves, refrigerators, sinks, cabinets, dishwashers, washing machines and dryers, mattresses, television, radios, record players, floor coverings (such as lino-

leum, carpets and rugs), pre-packaged sets of dinnerware, bulk toys, such as bicycles, gym sets, etc.; living room furniture, dining and bedroom furniture and miscellaneous casual furniture.

"The items covered by Group 1 are those which normally would be sold to customers in the retail store from floor samples maintained therein and with respect to which sales deliveries were normally made to the customer from warehouse stocks.

"11. Group 2 in the A. Polsky, Sterling Lindner Davis, and Morehouse-Fashion warehouses was composed of the following items:

"Luggage, sporting goods (such as golf equipment, fishing equipment, etc.), pillows and blankets, miscellaneous wrought iron novelties such as are normally sold in the stationery department of a department store; paints, some miscellaneous sizes of small rugs, sanitary goods, toilet paper and soaps and venetian blinds.

"The items covered by Group 2 are those which normally would be sold to customers in the retail store and delivered to the customer from stocks of merchandise maintained in the retail store and transferred from the warehouse to the retail store for that purpose.

"12. All the items of merchandise stored in the several warehouses of appellant were finished products in condition for sale to the ultimate consumer. The items stored, being held (a) for ultimate distribution to the retail department stores of appellant (Group 2), or (b) ultimate delivery to customers as the result of sales made to customers at the retail stores of appellant (Group 1). No sales were made to customers directly from warehouse stocks of merchandise. None

of the items stored in the said warehouse were manufactured by appellant, but all were purchased from suppliers located both within and without Ohio.

"13. The foregoing constitutes all of the facts to be offered by either of the parties hereto in these proceedings.

The Board of Tax Appeals of Ohio recognized and held that the Appellant's merchandise was for storage only, but nevertheless affirmed the assessment because of its lack of jurisdiction to declare a statute unconstitutional.

SUMMARY OF ARGUMENT

The argument for purposes of this case is the same as appears under the equal protection topic of the brief submitted in the companion case of *The Youngstown Sheet and Tube Company v. Stanley J. Bowers,* No. 9, October Term, 1958, and the same summary of arguments on the equal protection question presented there applies to this case:

1. Section 5701.08, Revised Code, is unconstitutional for the reason that it taxes personal property held by a residen for sorage only while at the same time excepting such property when owned and stored by a non-resident with the result that residents are denied equal protection of the laws.

2. The residence of a taxpayer is not a characteristic of the property being taxed or of the type of business in which the taxpayer engages in this state. Where the tax is against property used in business, a classification of taxpayers to be valid must rest upon some difference in the quality or kind of property owned and the business use to which it is put by the taxpayer in the taxing state.

3. Taxpayers who own the same kinds of property and who use that property in the same ways for the same business purpose belong to the same class and must be treated equally.

4. The exception from tax granted to non-residents for personal property held for storage only is an integral part of Section 5701.08, Revised Code of Ohio, and cannot be severed from that section. When the Ohio Legislature came on to reconsider the exception in 1955, it amended it in certain respects but did not remove it. The only part of the exception which was removed was the language which limited the benefit of the exception to nonresidents and which discriminated against residents. Thus if any language can be removed from the statute, it is the phrase, "belonging to nonresidents of this state", since the Legislature by its action has indicated that it does not consider such language to be a necessary part of the exception.

5. Section 5701.08, Revised Code of Ohio, is unconstitutional insofar as it imposes a discriminatory tax upon the business property of residents held for storage only and must to that extent be voided.

ARGUMENT

I. Former Section 5701.08, Revised Code of Ohio, is Unconstitutional to the Extent That it Operates to Levy a Resident When Held For Storage Only While at the Same Time Excepting the Merchandise of a Nonresident When Similarly Held.

The same arguments made against the levy and assessment of the tax upon the Youngstown Sheet & Tube Company in the companion case of *Youngstown Sheet & Tube Company v. Bowers,* No. 9, October Term, 1958, also apply to this case. Excepting for a discussion of points peculiar to the instant appeal, appellant adopts here all that has been said concerning the equal protection question in the brief submitted in *Youngstown, supra.*

The Ohio Supreme Court through its syllabus in *Allied Stores of Ohio, Inc. v. Bowers,* 166 Ohio St. 116, 140 N. E. 2d 411, (1957), held as follows:

> "Although a legislative enactment may be invalid merely because certain limiting language therein makes it repugnant to constitutional limitations, a court cannot cure such invalidity merely by striking such limiting language, where the elimination of such limiting language would substantially extend the operation of the legislative enactment beyond the scope contemplated by all the language of such legislative enactment."

Thus the Ohio Court decided that even though former Section 5701.08, Revised Code of Ohio, was discriminatory to resident taxpayers, the section would nevertheless have to be upheld because it expressed the intention of the Ohio Legislature.

The answer to this approach is that insofar as former Section 5701.08, discriminates against residents by impos-

ing an unequal tax burden upon them, it is unconstitutional and void, and should have been declared so by the Ohio Court.

Section 5701.08 defines property "used in business" to include all storage property, excepting that held by non-residents for storage only. In the two cases of *General Cigar Co., Inc. v. Peck*, 159 Ohio St. 152, 111 N. E. 2d 265 (1953), and *B. F. Goodrich Co. v. Peck*, 161 Ohio St. 202, 118 N. E. 2d 525 (1954), the Ohio Court construed the term "storage only" as applicable to inventories of personal property owned by a non-resident and stored in this State, so long as they were not subjected to any processing or manufacturing operations during storage.

In the *Goodrich* case *supra*, the record shows that the Goodrich Company stored retail merchandise in warehouses for shipment to its department stores in Ohio. The Ohio Court held that such merchandise was entitled to exception from the tax.

In the more recent case of *The Higbee Co. v. Bowers*, BTA No. 32136 (1958), see Appendix for the opinion, the Ohio Board of Tax Appeals, pursuant to a remand of the case by the Ohio Supreme Court in *Grinnell Corp. et al. v. Bowers*, 167 Ohio St. 267, 147 N. E. 2d 657, (1958), decided that a non-resident corporation which operates a large department store in the city of Cleveland, Ohio, was entitled to exception from the tax on its retail merchandise kept at its warehouse in Cleveland and later taken to the store and sold there.

This holding was not appealed to the Ohio Supreme Court and it therefore establishes the rule of law for retail merchandise held for storage only.

The Appellant in the instant case conducts the same kind of business, stores the same kind of merchandise, and disposes of it in the same way as did the Goodrich and Higbee

companies. Despite these similarities which place appellant in the same class with non-resident department stores, it has been denied equal treatment by being required to pay a tax which non-residents are relieved of paying. The resultant discrimination is not based upon any difference between the type of business being conducted by taxpayers of the type of merchandise being stored. It rests squarely upon a difference in residence. Since the Ohio tax is against property used in business, a discrimination in treatment based solely upon the taxpayer's residence is invalid and denies Ohio residents equal protection of the laws.

II. The Decision of Grinnell Corp. et al., v. Bowers, 167 Ohio St. 267, 147 N. E. 2d 657 (1958).

The Ohio Supreme Court in *Grinnell Corp., et al., v. Bowers,* 167 Ohio St. 267, 147 N. E. 2d 657, (1958), held that the storage only exception did not cover retail merchandise stored in a warehouse and delivered directly to the customer, but that it did apply where the merchandise was transported over a public highway from the warehouse to the store and sold at the store. Consequently, the appellant waives its claim at tax exception as to the merchandise listed in paragraph 10 of the stipulation (R. 11). But the merchandise listed in paragraph 11 (R. 11, 12), is entitled to exception, and the assessment which has been issued against it should be reversed.

CONCLUSION

For the reasons above stated, and for the further reasons presented by the brief in *The Youngstown Sheet & Tube Company v. Bowers*, No. 9, October Term, 1958, the appellant respectfully requests that the assessment against its property held for storage only be reversed as unconstitutional and judgment entered for the appellant.

Respectfully submitted,

CARLTON S. DARGUSCH,
CARLTON S. DARGUSCH, JR.,
JACK H. BERTSCH,
Attorneys for Appellant.

APPENDIX

Before the Board of Tax Appeals,
Department of Taxation, State of Ohio
The Higbee Company, Appellant, v. Stanley J. Bowers Tax Commissioner of Ohio, Appellee.

Entry

(Dated July 2, 1958.)

This cause and matter came on further to be considered by the Board of Tax Appeals following the receipt by the Board of Tax Appeals of a mandate from the Supreme Court of Ohio in the case of The Higbee Company, Appellant, v. Stanley J. Bowers, Tax Commissioner, Appellee, No. 35249 on the docket of that Court.

Upon consideration thereof the Board of Tax Appeals finds that under date of June 19, 1956, there was filed with the Board of Tax Appeals of the appellant above named from a final order of the Tax Commissioner dated May 29, 1956, in and by which final order the Tax Commissioner denied appellant's application for review and redetermination of an increased tangible personal property tax assessment made against it with respect to the year 1955.

The Board of Tax Appeals, by entry dated May 14, 1957, affirmed the final order of the Tax Commissioner complained of for reasons more fully set out in said entry. In brief, the Board of Tax Appeals found that appellant's merchandise and supply inventory located in 2 buildings in the City of Cleveland (one located on 11th Street and the other on Euclid Avenue at 66th Street) in the average amount of $5558,372 (appellant's Exhibit A) was not being "held in a storage warehouse for storage only" within the meaning of those words as used in Revised Code Section 5701.08 and, therefore, the merchandise and supplies must

be considered as "used in business in this state" and subject to Ohio taxation for the year 1955.

Thereafter, and within the time prescribed by law, the appellant filed an appeal with the Supreme Court of Ohio from said order of the Board of Tax Appeals; which appeal in the Supreme Court was docketed under the style and case number above noted. Thereafter, under date of February 5, 1958, the Supreme Court of Ohio, upon a consideration of the case presented by such appeal, rendered and entered a decision and judgment in and by which the matter was remanded to the Board of Tax Appeals for further consideration in accordance with the opinion rendered in the case of The Higbee Company, Appellant, v. Bowers, Tax Commissioner, Appellee, 167 Ohio St. Reports at page 267. This opinion is the same opinion rendered by the Supreme Court in 10 foreign corporation inventory cases and is commonly referred to as the Grinnell Corp. case.

The cause was resubmitted to the Board of Tax Appeals upon appellant's notice of appeal filed herein under date of June 19, 1956, the statutory transcript supplied by the Tax Commissioner, the testimony and evidence presented to this Board at the original hearing on September 19, 1956, and the testimony and evidence presented to us on April 18, 1958, pursuant to a request filed by counsel for appellant for an additional hearing. We also have before us the original and supplemental briefs filed by counsel and the opinions of the Supreme Court of Ohio in the cases of General Cigar Company, Inc. v. Peck, Tax Commissioner, 159 Ohio St. Reports at page 152; B. F. Goodrich Company v. Peck, Tax Commissioner, 161 Ohio St. Reports at page 202; and The Higbee Company v. Bowers, Tax Commissioner, 167 Ohio Reports at page 267.

The appellant, The Higbee Company, is a Delaware corporation qualified to do business in Ohio and it operates a general retail department store on the Public Square in Cleveland, Ohio. The Higbee Company has 2 warehouse facilities wherein are placed items of merchandise and supplies not immediately needed for display or sale purposes at its Public Square store. One warehouse, owned by The Higbee Company, is located on West 11th Street in Cleveland, Ohio, about one-half to three-fourths mile from the Public Square store. It is a 5 story structure containing about 100,000 square feet of usable storage space for such bulky items as furniture, mattresses, electrical appliances, television sets, etc. Supplies such as wrapping paper, tissue paper, cardboard boxes, etc. are also placed in this warehouse and such supplies are considered by this Board to be "merchandise" within the meaning of that term as the same is used in Revised Code Section 5701.08. See case of B. F. Goodrich v. Peek, supra.

The other warehouse is not owned by The Higbee Company, but is rented by it, and it consists of the first 2 floors of a 4 story building located at 66th Street and Euclid Avenue in Cleveland, Ohio, which location is approximately 5 miles from the Public Square store. It has about 36,000 square feet of usable storage space for carpets, rugs, chinaware, etc.

Employees of The Higbee Company operate both warehouses. No retail sales are made therein nor do any customers of The Higbee Company enter these warehouses for any purpose.

When the merchandise, except carpets and rugs, in these warehouses is moved therefrom its destination is to either Higbee's Public Square store or the homes or business places of Higbee's customers. In all instances the merchandise moves over the public highways.

Appellant claims that all the items of merchandise and supplies located in the warehouses that were moved from the warehouses to The Higbee Company Public Square store in the period from February 1, 1954, through January 31, 1955, were not subject to Ohio taxation for the year 1955 under the provisions of Revised Code Section 5701.08, the pertinent portion of which section reads as follows:

"* * *

"(A) Personal property is 'used' within the meaning of 'used in business' * * * when stored or kept on hand as materials, parts, products, or merchandise; but merchandise * * * belonging to a non-resident of this state is not used in business in this state if held in a storage warehouse for storage only. * * *."

Appellant says that certain of its merchandise and supplies moved over the public highways when transfer thereof was made from its warehouses to its Public Square store and, therefore, within the scope of Judge Taft's opinion in the case of The Higbee Company v. Bowers, supra, said merchandise and supplies are thereby excepted from taxation. A search of the statutes fails to disclose wherein movement of merchandise over a public highway either excepts merchandise from taxation or subjects such merchandise to taxation, and we believe that Judge Taft used this illustration merely to highlight his views relative to the tax status of materials and parts used by a non-resident manufacturer, and that he did not mean his illustration to apply to merchandise.

Appellant also claims that carpets and rugs, although not moved from the 66th Street warehouse to the Public Square store, are not subject to taxation for the reason that said carpets and rugs do not go directly from the warehouse to the customer, but that the same are picked

up from the warehouse by an independent company hired by The Higbee Company and taken to the carpet laying company's place of business for cutting, shaping and binding and then delivered by this independent operator to the Higbee customer. The appellant's claim may be stated in another way, to-wit: All its merchandise and supplies located in its 2 warehouses are not subject to Ohio taxation except only that merchandise which is eventually delivered by The Higbee Company directly from its warehouses to its customers.

In support of this claim the appellant cites the syllabus in the case of The Higbee Company v. Bowers, Supra, the pertinent portion of which syllabus reads as follows:

> "Property cannot be considered as 'held in a storage warehouse for storage only' within the meaning of Section 5701.08, Revised Code, as it read prior to September, 1955, in those instances where it is located in the place * * * from which it is in effect to be delivered by the taxpayer directly to a customer."

Originally the appellant claimed that none of its merchandise and supply inventory located in its two warehouses was subject to taxation for the year 1955 for the reason that said inventory, in the average value of $558,372, was kept in the warehouses for storage only. At the second hearing the appellant reduced its claim and now says that only such warehouse inventory as was delivered by appellant directly to its customers was taxable and that the balance of such inventory in the average amount of $233,178 was not subject to taxation. Its

original claim and its reduced claim is set out in Exhibit A as follows:

"Goods in Storage
1955 Personal Property Tax Return

	Original Claim (Corrected)	Revised Claim
Supplies	$ 63,946	$ 63,946
Merchandise		
Furniture	314,130	98,592
Carpets and Rugs	57,934	57,934
Miscellaneous (66th St.)	19,715	2,441
Miscellaneous (11th St.)	102,647	10,265
Total Merchandise	$494,426	$169,232
Total Supplies & Merchandise	$558,372	$233,178"

All the merchandise and supplies, in the average value of $233,178.00, are shown by the evidence to have been moved from the warehouse to appellant's Public Square store during the last 11 months of the year 1954 and the first month of the year 1955 except "carpets and rugs" in the average value of $57,934.00

In the course of the opinion written by Judge Taft in the case of The Higbee Company v. Bowers, supra, he uses this language which would appear to be pertinent to appellant's business operation:

> "Obviously property may be 'stored * * * as material, parts, products, or merchandise' although not 'kept on hand as material, parts or merchandise.' *Keeping property 'on hand' necessarily means keeping it readily available.* Merely storing it does not require any such meaning. Thus, the word 'stored' and 'kept on hand' apparently describe two different situations. When it undertook to provide against having property 'held for storage only' considered as property 'used in business,' the General Assembly said nothing about any such treatment for property 'kept on hand.' By what it said, it apparently contemplated such treatment only for property merely 'stored.' Although it might reasonably be argued that property 'kept

on hand' could sometimes be considered as 'held for storage only,' we believe that the General Assembly, in its provision for property 'held for storage only,' did not express an intent to limit the word 'stored.' Thus, where property is 'kept on hand as material, parts, products or merchandise,' it can not be considered as 'held for storage only.' (Emphasis ours.)

"* * *

"Further, we believe that, where shipments are regularly made by a taxpayer from a warehouse directly to his customers, it is more reasonable to say that property to be so shipped from such warehouse is 'kept *on hand* as material, parts, products or *merchandise*' than to say that it is merely 'stored * * * as material, parts, products or merchandise.' In such an instance, the taxpayer, instead of expanding his place of business to provide space for the merchandise he is selling, may in effect have adopted the warehouse as a part of his selling operation. This may be particularly apparent where the operation of the warehouse and shipments therefrom directly to customers are by the taxpayer instead of by some independent warehouse operator (as in case No. 35237). Cf. last proviso of third paragraph of Section 5711.05, Revised Code. Of course, more occasional shipments directly to customers might not require a finding of a keeping on hand rather than a storage operation.

"In the *Goodrich* case, no question was raised as to whether there could be a holding for storage only if shipments were regularly made by the taxpayer from his warehouse directly to his customers. Apparently, the property there held for sale was to be shipped to other locations and sales of it thereafter made from those other locations. Also, no question was raised in that case as to whether material to be used in manufacturing could be considered as 'held for storage only' if located at or near the place where it was to be so used. Also, no such questions were raised or considered in the *General Cigar* case. * * *."

The Tax Commissioner says that appellant has adopted the warehouses as a part of its selling operation and that all of its items of merchandise and supplies, whether in the Public Square building or in either of the warehouses, are "kept on hand" to be used in appellant's business activities and are, therefore, subject to Ohio taxation.

Although we are inclined to agree with the Tax Commissioner, we do not believe that the decisions of the Supreme Court in the foreign corporations inventory cases, above noted, support said view.

The Tax Commissioner also says that the syllabus in the case of The Higbee Company v. Bowers, supra, clearly indicates, by the use of the words "in effect" in said syllabus, that appellant's rugs and carpets are delivered by the taxpayer directly from the warehouse to a customer even though the delivery is actually made by an agent hired by Higbee. In this respect we are inclined to agree with the Tax Commissioner in his interpretation of the Supreme Court's decision. In each instance the sale of the carpeting was consummated while the carpeting was still in the warehouse, and it was delivered from the warehouse operated by appellant to appellant's customers by an agent hired by appellant. It does not appear to us to be significant that the agent first moved the carpeting to its own place of business for cutting and binding before moving it on to the customer's premises for installation. In this connection it might also be noted that we are not here concerned with an independent warehouse operation such as was involved in the case of Philip Morris v. Bowers, case No. 32145 on the docket of the Board of Tax Appeals. The Higbee Company rents the 66th Street warehouse, but it is operated and controlled by Higbee employees.

Upon a consideration of the case as thus presented to us, and giving effect to the conclusions above noted, it is

found that the merchandise and supplies located in appellant's 2 warehouses in the following average values:

Supplies	$ 63,946.00
Furniture	98,592.00
Miscellaneous (66th St.)	2,441.00
Miscellaneous (11th St.)	10,265.00
Total	$175,244.00

are excepted from taxation for the year 1955 as being merchandise held in a storage warehouse for stoarge only by a nonresident of this State.

The final order of the Tax Commisioner is, therefore, modified to give effect to this finding and, as thus modified, the final order of the Tax Commissioner is affirmed.

No. 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

On Appeal from the Supreme Court of Ohio

ALLIED STORES OF OHIO, INC.,
Appellant.

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

REPLY BRIEF FOR APPELLANT.

CARLTON S. DARGUSCH,
CARLTON S. DARGUSCH, JR.,
JACK H. BERTSCH,
Attorneys for Appellant.

WILLIAM SAXBE,
Attorney General,
JOHN M. TOBIN,
Assistant Attorney General,
Attorneys for Appellee.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 10

ALLIED STORES OF OHIO, INC.,

Appellant.

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

REPLY BRIEF FOR APPELLANT.

I

FORMER SECTION 5701.08, REVISED CODE OF OHIO, DENIES RESIDENTS EQUAL PROTECTION OF THE LAWS.

Former Section 5701.08, Revised Code of Ohio, taxed all storages of tangible personal property held for use in business in Ohio, excepting agricultural products and merchandise belonging to a nonresident and held for storage only. The terms "storage only" have been construed by the Ohio Supreme Court on three separate occasions, *General Cigar Co., Inc. v. Peck*, 159 Ohio St. 152, 111 N. E. 2d 265 (1953); *B. F. Goodrich v. Peck*, 161 Ohio St., 202, 118 N. E.

2d 525 (1954); and *Grinnell Corp. et al., v. Bowers*, 167 Ohio St., 267, 147 N. E. 2d 657 (1958). These cases hold that where a nonresident corporation does business in the State of Ohio (either manufacturing or retail selling), and where pursuant to that business it stores goods, without any processing being done to them during storage, and for later transportation over a public highway to the place of business in Ohio (either to the plant or retail store), such property is for "storage only" and therefore is not subject to Ohio's tangible personal property tax.

Taking into consideration the Ohio Supreme Court's construction, the only possible bases for imposing a discriminatory tax on merchandise held for storage only by resident businesses would be that residents somehow use property in business differently from nonresidents, or somehow hold property in storage only for use in business differently from nonresidents. The Ohio statutes contain no provision to that effect, nor do the cases decided by the Ohio Supreme Court and indeed they clearly disprove it. A typical example is the *Goodrich Case, supra*, where the taxpayer was a nonresident corporation engaged both in manufacturing and retail selling in Ohio. Its manufacturing operations and methods of storing raw materials are indistinguishable from those of The Youngstown Sheet and Tube Company. Likewise, its retail selling operations and methods of storing retail merchandise are indistinguishable from those of Allied Stores of Ohio, Inc. Yet both the Youngstown and Allied companies, and other residents similarly situated, have been denied the equal protection of the laws by being forced to pay a tax which Goodrich and nonresident businesses in general are protected from paying under the statute.

In view of the above, it is unrealistic for the commissioner to argue, as he does on page 6 of his brief in *Allied Stores of Ohio, Inc. v. Stanley J. Bowers* (No. 10), that nonresidents doing business in Ohio store property for use in their Ohio business enterprises less frequently than do resident businesses, and the number of cases in which nonresidents have claimed the benefit of the exception proves just the contrary to be true.

As between any two given companies engaged in the same kind of business and to the same extent, both would hold merchandise for storage only for purposes of their businesses, regardless of where they were incorporated. The amount of property held for storage only depends upon a company's business, not upon where it may have happened to have filed its incorporation papers.

Moreover, in the *Allied Stores Case* (No. 10), the Ohio Board of Tax Appeals, which was the forum of original jurisdiction, found expressly on the facts that Allied Stores conducted its retail business in exactly the same way as did the Goodrich Company in the case of *B. F. Goodrich v. Peck, supra,* and that the only difference between, and the only reason why Goodrich was excepted and Allied taxed, was residence. This finding of fact was not disturbed by the Ohio Court of Appeals or the Ohio Supreme Court.

The Commissioner also argues in his Allied Stores brief on page 6, that the exception was designed to induce out-of-state businesses to come into Ohio. In the first place, the exception is not extended to out-of-state businesses, but to nonresidents, which is something entirely different. The state where a corporation has its residence has nothing to do with the state or states where it does business. And in the second place, aside from merchandise held for storage only, in every other instance under the Ohio personal prop-

erty tax statutes, residents and nonresidents alike pay the same taxes. Were Ohio seeking to encourage out-of-state businesses to locate in Ohio, it would have granted the exception in those terms, rather than in terms of residence, and it would have granted the exception across the board, rather than just for "storage only."

Finally, the commissioner refers to the case of *Madden v. Kentucky*, 309, U. S. 83, 88 (1940), which states.

> "Traditionally classification has been a device for fitting tax programs to local needs and usages *in order to achieve an equitable distribution of the tax burden.*" (Emphasis added.)

It has already been amply demonstrated that the discrimination in the instant case against resident businesses results in an inequitable tax burden being cast upon them. The tax here cannot, therefore, bring about an equitable distribution of the tax burden, but has the single effect of penalizing resident businesses unfairly, simply because of their residence, and as appellant showed in its original brief, where a tax is upon property, as it is in this case, a classification based upon the owner's residence is unconstitutional.

Admittedly, Ohio may make the statutory declaration that property held for storage only and not yet devoted to a business use is not used in business and therefore is not taxable, but it may not do so with regard to one group in a class (nonresidents) and refuse to do so with regard to others in the same class (residents). In sum, it cannot protect one group from tax on the ground that its property held for storage only is not used in business, and refuse to grant equal protection for the same property to others in the same class.

II

THE EXCEPTION FOR PROPERTY HELD FOR STORAGE ONLY CANNOT BE REMOVED BECAUSE SUCH REMOVAL WOULD RESULT IN THE JUDICIAL LEVY OF A TAX.

Under the second branch of the commissioner's argument on the equal protection side of this case, he contends that the exception provided nonresidents as to property held for storage only should be removed from the statute by this Court. Little need be added to what appellant has already said on this point in its main brief.

When the Ohio Legislature enacted the exception, it thereby excluded nonresidents from the levy of the tax. Now, therefore, for this Court to remove the exception would have the result of levying a tax by judicial direction rather than by legislative authority. As this Court observed in *Thompson v. Allen County*, 115 U. S. 550 (1885):

> "The Court also said (in *Rees v. Watertown*, 19 Wall. 107 (1874)) the power to direct a tax to be levied is the highest attribute of sovereignty, and is exercised by legislative authority only. It is a power that has not been extended to the judiciary. 'Especially,' says the opinion, 'is it beyond the power of the federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important'." (parenthetical matter added)

Nor has appellant ever asked that the exception be removed, or that the rights or privileges of nonresidents be prejudiced in any way. What it does ask, and what the Constitution guarantees to it, is equal protection with nonresidents by being excepted from the tax on the same basis as nonresidents.

To accomplish this equality of protection, there is no need to remove language from the statute, and thus levy a tax where none formerly existed. It is only necessary to declare former Section 5701.08, Revised Code of Ohio, unconstitutional insofar and to the extent that it taxes property held by residents for storage only. When this is done, and there has never been any question of the Court's power and duty to do it, every Ohio business—resident and nonresident alike—will be protected equally.

For these reasons, appellant submits that the exception accorded nonresidents cannot be removed from former Section 5701.08, Revised Code of Ohio, but that the remainder of the Section should be restricted to meet the requirements of equal protection of the laws, and that this is the proper course and the course which the Ohio Supreme Court should have taken.

Respectfully submitted,

CARLTON S. DARGUSCH,
CARLTON S. DARGUSCH, JR.,
JACK H. BEBTSCH,
Attorneys for Appellant.

No. 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Appeal from the Supreme Court of Ohio

ALLIED STORES OF OHIO, INC.,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

MOTION TO DISMISS

WILLIAM SAXBE,
Attorney General.
JOHN M. TOBIN,
Assistant Attorney General,
State House, Columbus 15, Ohio,
Attorneys for Appellee.

CARLTON S. DARGUSCH, SR.,
33 North High St., Columbus 15, Ohio,
Attorney for Appellant.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 589

ALLIED STORES OF OHIO, INC.,

Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

MOTION TO DISMISS

Appellee, pursuant to Rule 16 (b) of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed on the grounds that no substantial federal question is presented thereby, and that the decision of the Supreme Court of Ohio, from which appeal was taken, rests upon adequate nonfederal grounds.

STATEMENT OF THE CASE

The appellant corporation is organized under the laws of the State of Ohio and is engaged in the operation of retail department stores within the State of Ohio. During the years in question, appellant maintained warehouses in various cities in Ohio from which merchandise was shipped

to the various retail stores of the appellant, or to retail customers of the appellant. No manufacturing nor processing of any kind was conducted in connection with the storage of appellant's merchandise during the time that it was retained in warehouses.

The statutes drawn in issue in this appeal are Section 5701.08, Revised Code of Ohio (Title 57, *Page's Ohio Revised Code Annotated*, page 13; Vol. 6, *Baldwin's Ohio Revised Code and Service*, Title 57, page 5), which provides in full:

> "As used in Title LVII of the Revised Code:
>
> "(A) Personal property is 'used' within the meaning of 'used in business' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products, or merchandise; but merchandise or agricultural products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only. Moneys, deposits, investments, accounts receivable, and prepaid items, and other taxable intangibles are 'used' when they or the avails thereof are being applied, or are intended to be applied, in the conduct of the business, whether in this state or elsewhere.
>
> "(B) 'Business' includes all enterprises conducted for gain, profit, or income and extends to personal service occupations."

and Section 5709.01, Revised Code of Ohio (Title 57, *Page's Ohio Revised Code Annotated*, page 78; Vol. 6, *Baldwin's Ohio Revised Code and Service*, Title 57, page 40), which provides in full:

> "All real property in this state is subject to taxation, except only such as is expressly exempted therefrom. All personal property located and used in busi-

ness in this state, and all domestic animals kept in this state, whether or not used in business, are subject to taxation, regardless of the residence of the owners thereof. All ships, vessels, and boats, and all shares and interests therein, defined in section 5701.03 of the Revised Code as personal property and belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21, inclusive, of the Revised Code, are subject to taxation. All property mentioned in this section shall be entered on the general tax list and duplicate of taxable property."

The Supreme Court of Ohio, by decision of January 30, 1957, ruled that it was not necessary to consider the constitutional question raised by appellant, and held further that the merchandise of appellant was subject to personal property taxation as personal property used in business in Ohio.

ARGUMENT

A. The Decision of the Ohio Supreme Court Does Not Deny Appellant Equal Protection of the Laws Contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States

Section 5709.01, Revised Code of Ohio, subjects to taxation "all personal property located and used in business in this state." In determining an issue of personal property taxation, the question becomes: Is the property located in the state and is it used in business in the state?

The General Assembly of Ohio has legislatively determined that merchandise of a nonresident is not "used in business in this state if held in a storage warehouse for storage only." No doubt the basis for this legislative pronouncement was the conviction that property which was not used in business in the state in any real sense should not be taxed, and the knowledge that such property of a nonresident was ordinarily neither a product of this state nor was it destined to be committed to the commerce of this state.

The fact that the classification used to attain this end may be disputed or that its effect may be opposed by argument does not mean that it violates constitutional limitations. *Heisler v. Thomas Colliery Co.*, 260 U. S., 245, 43 S. Ct., 83; *Citizens' Telephone Co. of Grand Rapids v. Fuller*, 229 U. S., 322, 33 S. Ct., 833; *Quong Wing v. Kirkendall*, 223 U. S., 59, 32 S. Ct., 192. Neither does the limitation engrafted upon the legislative power of classification by the equal protection provisions require identity of treatment. It requires only that the different treatments be not so disparate, relative to the difference in classification, as

to be wholly arbitrary. *Walters v. City of St. Louis, Mo.*, 347 U. S., 231, 74 S. Ct., 505.

In this regard the Supreme Court of Ohio held in *National Tube Co. v. Peck*, 159 Ohio St., 98, as disclosed by the sixth paragraph of the syllabus, that:

> "6. The equal-protection provisions of the Constitutions do not require the state to maintain a rigid rule of taxation, to resort to close distinctions, or to maintain a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial or which are based on discrimination not shown to be arbitrary or capricious do not fall within constitutional prohibitions."

In the case of *Charleston Federal Savings & Loan Assn. v. Alderson*, 324 U. S., 182, 65 S. Ct., 624, at page 191 of 324 U. S. this Court noted:

> "It is plain that the Fourteenth Amendment does not preclude a state from placing notes and receivables in a different class from personal property used in agriculture and the products of agriculture, including livestock, and taxing the two classes differently, even though the state places them in a single class for other purposes of taxation. * * *"

There are many instances of license and tax laws which favor nonresidents. They are often based on the theory that residents use certain facilities or exercise certain privileges regularly while nonresidents use such facilities or exercise such privileges only on occasions or irregularly; an example, motor vehicle license laws. Obviously in a particular case this theory may not be borne out, but classification is necessarily based on the general, not the specific.

B. A Determination of the Federal Question Raised by Appellant Was Not Necessary in the Decision Rendered by the Ohio Supreme Court and the Decision, as Rendered, Was Based Upon Adequate Nonfederal Grounds, and Should Not Be Reviewed by This Court

The opinion of the Supreme Court of Ohio begins with this observation by Judge Taft at pages 117 and 118 of 166 Ohio St., 116:

> "Ordinarily, a constitutional question will not be considered unless it is necessary to consider such constitutional question in deciding the case before the court. In our opinion, *it is not necessary to consider the constitutional question raised by the taxpayer in the instant case* because, if its contention with regard to that question is sound, it necessarily leads to the conclusion that the entire proviso in subdivision (A) of Section 5701.08, which read, 'but merchandise or agricultural products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only,' was void and should be stricken. * * *" (Emphasis added.)

The decision is then placed upon the basis of the limitation of the power of the court in interpretation of legislative enactments. At page 118 of the official report the following statement appears:

> "Although a legislative enactment may be invalid merely because certain limiting language therein makes it repugnant to constitutional limitations, a court cannot cure such invalidity merely by striking such limiting language, if the elimination of such limiting language would substantially extend the operation of the legislative enactment beyond the scope contemplated by all the language of such legislative enactment."

It thus is apparent that the basis of the decision of the Supreme Court of Ohio is a fundamental nonfederal ground: separation of powers. The recognition by the

court of its limitations and the refusal of the court to impinge upon legislative prerogatives would appear to be adequate grounds for the decision. Therefore, the decision should not be reviewed by this Honorable Court. See *Murdock v. Memphis*, 20 Wall., 590, 636; *Fox Film Corp. v. Muller*, 296 U. S., 207; *Wood v. Chesborough*, 228 U. S., 672, 676-680.

C. No Substantial Federal Question is Presented

Courts have been called upon many times to determine whether certain taxing statutes, which in specific terms or in operation do not regard all taxpayers alike, violate constitutional safeguards as to discrimination. Courts have consistently held that where discrimination between classes has not been capricious or arbitrary the statutes do not transgress the constitutional boundaries. *Walters v. City of St. Louis, Mo.*, 347 U. S., 231, 74 S. Ct., 505; *Citizens' Telephone Co. of Grand Rapids v. Fuller*, 229 U. S., 322, 33 S. Ct., 833; *National Tube Co. v. Peck*, 159 Ohio St., 98, 111 N. E. 2d, 11. The statutes in issue do not contravene constitutional guarantees.

CONCLUSION

It is respectfully submitted therefore that the decision of the Supreme Court of Ohio does not deny appellant equal protection of the laws, that the decision is based upon adequate and independent nonfederal grounds, that no substantial federal question is presented, and that the appeal should be dismissed.

Respectfully submitted,

WILLIAM SAXBE,
Attorney General.
JOHN M. TOBIN,
Assistant Attorney General,
State House, Columbus 15, Ohio,
Attorneys for Appellee.

No. 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

Appeal from the Supreme Court of Ohio

ALLIED STORES OF OHIO, INC.,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

BRIEF OF APPELLEE

WILLIAM SAXBE,
Attorney General,
JOHN M. TOBIN,
Assistant Attorney General,
State House, Columbus 15, Ohio,
Attorneys for Appellee

CARLTON S. DARGUSCH
CARLTON S. DARGUSCH, JR.
JACK H. BERTSCH
33 N. High St., Columbus 15, Ohio
Attorneys for Appellant

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

INDEX

Cases Cited

Statutes Cited

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 10

ALLIED STORES OF OHIO, INC.,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

BRIEF OF APPELLEE

QUESTIONS PRESENTED

1. Does the proviso contained in Section 5701.08, Revised Code of Ohio, granting exemption from personal property taxation to property of nonresidents of Ohio held in a storage warehouse for storage only, deny appellant equal protection of the laws under the Constitution of the United States?

2. If the appellant is denied equal protection of the laws under the Constitution of the United States, to what relief, if any, is the appellant entitled?

STATEMENT OF THE CASE

The facts of the case have been stipulated (R. 7-12).

The appellant is an Ohio corporation engaged in the operation of retail department stores within the state of Ohio.

The appellant has conceded the taxability of the majority of its inventory which was assessed for personal property taxation by the Tax Commissioner of Ohio. There remains in issue that portion of the appellant's inventory designated in the stipulation as Group 2 (R. 8-11). Group 2 inventory consists of merchandise sold at retail stores from stocks of merchandise maintained in such stores and transferred from warehouse to the stores for that purpose (R. 12).

Appellant contends that since property of a nonresident of Ohio which is held in a storage warehouse for storage only is specifically exempted from the imposition of the Ohio personal property tax, such property of the appellant as is designated herein as Group 2 inventory should likewise be entitled to exemption from personal property taxation.

The Supreme Court of Ohio upon consideration of this matter denied appellant's contention on the grounds that (1) it lacked the power to amend the statute by striking the phrase "belonging to a nonresident of this state;" (2) such phrase was an integral part of a separable portion of the statute; (3) by striking such separable portion the appellant's claim would fail since nonresidents would no longer be entitled to exemption from personal property taxation; and (4) based upon the court's construction of the statute, the appellant did not have a standing to obtain the relief which it sought.

SUMMARY OF ARGUMENT

1. Classification for purposes of taxation is a legislative function. If a reasonable basis for the classification exists, it does not lead to denial of equal protection of the laws.

2. If the exemption of property owned by a nonresident and held in a storage warehouse for storage only results in discrimination against the appellant, the only method of reestablishing equality of taxation is to strike the entire proviso granting the exemption to nonresidents since the phrase "belonging to a nonresident" is not separable from the proviso.

The Supreme Court of Ohio was correct in refusing to accept appellant's claim because, if the appellant was correct in its argument that the exemption granted to nonresidents denied appellant equal protection of the laws, proper rules of statutory construction require that only separable portions of a statute which are unconstitutional may be stricken and that the Court should uphold valid provisions which are separable from the unconstitutional portions; the phrase "belonging to a nonresident" is not a separable portion but is rather an integral part of a proviso. Thus, if the entire proviso be striken, nonresidents will no longer be afforded exemption and further equal treatment will be granted to all taxpayers.

ARGUMENT

EQUAL PROTECTION

A. The Proviso Contained in Section 5701.08, Revised Code of Ohio, does not Deny Appellant Equal Protection of the Laws Contrary to the Constitution of the United States.

Section 5701.08, Revised Code of Ohio, during the tax year in question, read as follows:

> "As used in Title LVII of the Revised Code:
>
> "(A) Personal property is 'used' within the meaning of 'used in business' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products, or merchandise; *but merchandise or agricultural products belonging to a nonresident of this state is used in business in this state if held in a storage warehouse for storage only.* Moneys, deposits, investments, accounts receivable, and prepaid items, and other taxable intangibles are 'used' when they or the avails thereof are being applied, or are intended to be applied, in the conduct of the business, whether in this state or elsewhere.
>
> "(B) 'Business' includes all enterprises conducted for gain, profit, or income and extends to personal service occupations." (Emphasis added.)

The basis of appellant's claim of denial of equal protection of the laws is the proviso which is set forth above in italics.

There is no question but that the challenged exception operates equally upon all persons within the two classes which it creates. The only question is whether the classifi-

cation itself is so artificial and capricious as to deny to residents the equal protection of the laws.

Within constitutional limits the power to tax is purely legislative and the power to exempt any class of persons or property from taxation for reasons not clearly arbitrary is likewise a legislative power with which courts are not concerned. *Travelers' Insurance Company* v. *Connecticut*, 185 U.S., 364. The limitation engrafted on such legislative power by the equal protection provisions does not require identity of treatment, but only that the different treatments be not so disparate as to be wholly arbitrary. *Walters* v. *City of St. Louis, Mo.*, 347 U. S., 231, 74 S.Ct., 505.

In this regard, this Court announced in *State Board of Tax Commissioners of Indiana* v. *Jackson*, 283 U. S., 527, 537, that:

> "The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, * * * or if any state of facts reasonably can be conceived to sustain it. * * *"

In granting exemption to nonresident property held in storage, the General Assembly of Ohio must have determined that property of a nonresident was entitled to different treatment because such property would not likely be destined for introduction into the Ohio stream of commerce and that such property would be taxed at its destination or at the domicile of the nonresident. The fact that the classification used to attain this end may be disputed or that its effect may be opposed by argument does not mean that it violates constitutional limitations. *Heisler* v. *Thomas Colliery Co.*, 260 U.S., 245, 43 S.Ct., 83; *Citizens' Telephone Co. of Grand Rapids* v. *Fuller*, 229 U.S., 322, 33 S.Ct., 833; *Quong Wing* v. *Kirdendall*, 223 U.S., 59, 32 S.Ct., 192. Obviously in a particular case this theory may not be

borne out, but classification is necessarily based on the general, not the specific.

In the case of *Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324, U.S., 182, 65 S.Ct., 624, at page 191 of 324 U.S., this Court noted:

> "It is plain that the Fourteenth Amendment does not preclude a state from placing notes and receivables in a different class from personal property used in agriculture and the products of agriculture, including livestock, and taxing the two classes differently, even though the state places them in a single class for other purposes of taxation. * * *"

There are many instances of license and tax laws which favor nonresidents. They are often based on the theory that residents use certain facilities or exercise certain privileges regularly while nonresidents use such facilities or exercise such privileges only on occasions or irregularly; an example, motor vehicle license laws.

Legislative classification for purposes of encouraging industrial location has also withstood the challenge of unconstitutionality. In the main, such legislation has excepted from all taxation, for limited periods, certain industries or all industrial plants or even a particular corporation. *Williams* v. *Mayor and City Council of Baltimore*, 289 U.S., 36; *Crow* v. *General Cable Corp.*, 223 Ala., 611, 137 So., 657.

Examination of the legislative classifications sustained in the cases considered above discloses that they either attempted to produce general tax equality or that they were predicated upon economic policies. None creates indisputable divisions or classes and all produce certain inequalities. Of course, complete equality in the field of taxation is neither required nor attainable. *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S., 495. Significantly, however, the result sought in each instance was within

the legislative purview and the distinctions drawn to this end were not palpably unfounded.

In *Madden* v. *Kentucky*, 308 U.S., 83, 88, it is observed:

> "* * * Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. * * *"

It is submitted that there has been no showing that there exists a hostile discrimination against appellant.

Conclusion

The exemption from personal property taxation accorded property of a nonresident when held in a storage warehouse for storage only does not deny to the appellant equal protection of the laws since there exists a reasonable basis for the distinction in treatment and since there is no hostile or oppressive discrimination against persons or classes.

B. Assuming That the Appellee's Position on the Question of Reasonable Classification is Not Well Taken, the Appellant is Still not Entitled to Tax Exemption.

Assuming arguendo that there exists an unconstitutional discrimination against the appellant or, stated another way, that the appellant has been denied equal protection of the laws, the problem then becomes, what is it about the Ohio law that causes such discrimination or denial of equal protection? Since the basis of the appel-

lant's claim is that nonresidents are afforded an advantage not granted to residents on the basis of a portion of Section 5701.08, Revised Code of Ohio, it seems to follow that careful examination must be made of that statute. The first question to be answered is, does the statute contain any separate parts or provisions? The purport of the statute is to define the term "used in business." From this definition the legislature has excluded property belonging to a nonresident when held in a storage warehouse for storage only. Thus property so held is not used in business in Ohio.

If there is unconstitutional discrimination, we must look to the cause of such discrimination. Both parties to this appeal would point to the same statutory language, the proviso granting the exemption to nonresidents. The difference of opinion arises, however, as to the following step. The appellant contends that the solution is to strike the phrase "belonging to a nonresident." It is the position of the Tax Commissioner that this language is not in and of itself a separate provision of the statute but is rather only a part of a separate provision, to wit, "but merchandise or agricultural products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only." It then follows that on the basis of a sound statutory construction to cure the unconstitutional character of this statute the entire proviso must be stricken.

The Supreme Court of Ohio has concurred in the Tax Commissioner's construction of this statute. It would seem that such acquiescence is dispositive of the question of statutory construction. *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 267 U.S., 552, 69 L.Ed., 785, 45 S.Ct., 441; *Dorchy* v. *Kansas*, 264 U.S., 286, 68 L.Ed., 686, 44 S.Ct.,

323; *W. W. Cargill Co.* v. *Minnesota*, 180 U.S., 452, 45 L.Ed., 619, 21 S.Ct., 423; *Tullis* v. *Lake Erie & W. R. Co.*, 175 U.S., 348, 44 L.Ed., 192, 20 S.Ct., 136.

Section 1.13, Revised Code of Ohio, reads in full as follows:

> "Each section of the Revised Code and every part of each section is an independent section and part of a section, and the holding of any section or a part thereof to be unconstitutional, void, or ineffective for any cause does not affect the validity or constitutionality of any other section or part thereof."

It is an elemental rule of statutory construction that a statute may be constitutional in one part and unconstitutional in another and if the invalid part is separate from the rest of the statute the portion which is constitutional may be retained while that which is unconstitutional is stricken. It would appear that the decision as to whether constitutional portions of the statute should be upheld is primarily one of legislative intention.

The Ohio General Assembly has enacted a complete system of state taxation of personal property. Section 5709.01, Revised Code of Ohio, requires that all property located and used in business in Ohio be subject to taxation. The General Assembly defined "used in business." Section 5701.08, Revised Code of Ohio. If an exclusion from the legislative definition of "used in business" is unconstitutional, the remaining portion of the definition statute which is complete may be given continuing effect. The remaining portion is sufficient to accomplish the purpose of the statute; a complete method of taxation exists. *Ft. Smith* v. *Scruggs*, 70 Ark., 549, 69 S.W., 679; *Stillman* v. *Lynch*, 56 Utah, 540, 192 P. 272. *El Paso, etc.*, v. *Gutierrez*, 215 U.S., 87, 54 L.Ed., 106, 30 S.Ct., 21.

In 1931 the General Assembly of Ohio enacted 114 Ohio Laws, 714, 716, which defined "used in business." Two years later the proviso under discussion was enacted. 115 Ohio Laws, 548, 553. This, it is submitted, is another indication that the proviso is not an essential part of the elemental law and that the law can stand without the proviso. It is also clear indication that the legislature would have enacted the statute with the unconstitutional part stricken therefrom.

It would seem that the rule applicable to the separability of constitutional and unconstitutional provisions would be particularly significant when the separable portion was enacted as an amendment to the basic law.

We must look finally to the standing of the appellant before this Court. In order to equalize appellant's treatment, the only solution appears to be that announced by Judge Taft in *Allied Stores of Ohio, Inc.*, v. *Bowers*, 166 Ohio St., 116. Judge Taft refused to accept appellant's argument because if the appellant was correct in concluding that there was unconstitutional discrimination, then the solution would be to strike the separable portion of the statute. To do otherwise would be to extend an exemption from taxation. Taxation is the rule; exemption the exception. Judge Taft observed that if the entire proviso is stricken, then the appellant's claim would fall because nonresidents would no longer be afforded an exemption and there would be no discrimination.

The appellant argues that in order to correct the discrimination against it the proper procedure would be to grant exemption from taxation to it. However, this would require that an exemption be extended and that the Court exercise, in effect, a legislative function. Additionally, this solution would result in a peculiar type of equality. The Supreme Court of Ohio has commented on this type

of equality in the case of *The Cleveland Trust Company* v. *Lander, Treas.*, 62 Ohio St., 266, at page 268:

> "* * * If the county auditors have been derelict in their duties, as to the taxation of banks, bankers, banking associations or the stock or shares of such corporations, the proper remedy is not to still further transgress the law by remitting still other taxes in a vain effort to secure equality, but by bringing all up to the standard of the statute, and thereby securing equality of taxation as near as may be. * * *"

CONCLUSION

If appellant has been denied equal protection of the laws the following conclusions are submitted:

1. The cause of such unconstitutional discrimination is the entire proviso contained in Section 5701.08, Revised Code of Ohio, and not merely one word or one phrase of the proviso.

2. The proviso as a whole is separable from the other portions of the statute.

3. Section 1.13, Revised Code of Ohio, is consistent with the accepted rules of statutory construction and provides that each section of the Ohio Revised Code and each part thereof is an independent portion so that the holding of any section or part of a section of the Ohio Revised Code unconstitutional does not affect the constitutionality of the remainder.

4. The Ohio Supreme Court determination on the question of statutory construction is dispositive.

5. The Ohio General Assembly has enacted a complete scheme of taxation of all personal property located and used in business in Ohio.

6. Whether the subjective test, the legislative intent, or the objective test, the ability of the statute to continue to

operate in furtherance of its purposes, is applied, the result is that the proviso is separable.

7. The Supreme Court of Ohio was correct in refusing to grant relief to the appellant.

Respectfully submitted,

WILLIAM SAXBE,
Attorney General,
JOHN M. TOBIN,
Assistant Attorney General,
State House, Columbus 15, Ohio,
Attorneys for Appellee

APPENDIX

Section 5709.01, Revised Code of Ohio.

All real property in this state is subject to taxation, except only such as is expressly exempted therefrom. All personal property located and used in business in this state, and all domestic animals kept in this state, whether or not used in business, are subject to taxation, regardless of the residence of the owners thereof. All ships, vessels, and boats, and all shares and interests therein, defined in section 5701.03 of the Revised Code as personal property and belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21, inclusive, of the Revised Code, are subject to taxation. All property mentioned in this section shall be entered on the general tax list and duplicate of taxable property.